No. 988

Supreme Court, U.S.
FILED
MAY 8 1958
JOHN T. FEY, Clerk

TRANSCRIPT OF RECORD

United States Court Of Appeals

TENTH CIRCUIT

No. 5574

THE ELGIN CORPORATION, Appellant,

vs.

THE ATLAS BUILDING PRODUCTS COMPANY,
Appellee.

Appeal From The United States District Court
For The District of New Mexico.

Filed February 18, 1957.

United States Court Of Appeals

TENTH CIRCUIT

No. 5574

THE ELGIN CORPORATION, Appellant,

vs.

THE ATLAS BUILDING PRODUCTS COMPANY,
Appellee.

Appeal From The United States District Court
For The District Of New Mexico.

INDEX.

	Orig.	Record
Motion for diminution of record etc.	--	1
Order on diminution of record	--	3
Complaint	1	6
Answer to application for preliminary injunction	6	10
Affidavit of Milton W. Stovall	8	11
Answer to complaint	12	15
Plaintiff's interrogatories	16	17
Answers to plaintiff's interrogatories	24	20
Further answers to plaintiff's interrogatories	40	29
Further answers to plaintiff's interrogatories	43	34
Further answers to plaintiff's interrogatories	56	59
Pre-trial conference proceedings (excerpts)	--	73

	Orig.	Record
Further interrogatories by plaintiff	64	76
Answers to further interrogatories	68	79
Plaintiff's motion to strike	70	80
Amended motion to strike	72	81
Order denying motion to strike	75	83
Plaintiff's requested instructions	76	83
Defendant's requested instructions	84	88
Court's instructions	--	93
Plaintiff's objections to court's instructions	--	102
Defendant's objections to court's instructions	--	104
Verdict	96	105
Clerk's docket entry re judgment	97	106
Judgment	98	106
Notice of appeal	99	107
First amended statement of points relied on .	101	
Orders extending time for docketing cause ...	100	112
Clerk's certificate	114	112

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 5574

THE ELGIN CORPORATION, Appellant,

vs.

THE ATLAS BUILDING PRODUCTS COMPANY,
Appellee.

Motion For Diminution Of Record On Appeal,
And To Dispense With Printing Of Record
And Briefs Of Appellant.

Appellant moves the Court for an order striking from the record on appeal the following matters designated by appellee for inclusion in the record, on the ground that such matters are irrelevant and immaterial to the issues on this appeal:

1. All of the exhibits which were introduced at the trial on the merits and which were received in evidence by the Court.

2. All of the testimony of the following witnesses in the trial on the merits in question and answer form:

Robert Elgin, Joe B. Turner, Milton W. Stovall, Thomas W. Foy, Ervin H. Hahn, William Parish, William Russell, Harold Bishop, Howard Cearley, N. N. McCrary, J. V. Glenn, W. E. Johnson, Joe Hannawalt, Carl Hansen, R. R. Ellerson.

3. Defendant's motion to dismiss at the close of the plaintiff's case.

4. Defendant's motion to dismiss at the close of all of the evidence.

5. The requested instructions of the defendant.

6. The defendant's objections to the instructions of the Court.

As further grounds for its motion, appellant says that it is insolvent, but, being a corporation, is not entitled to proceed in forma pauperis; that counsel for appellee, knowing appellant's financial condition, have endeavored to make the record on appeal so expensive that appellant cannot perfect its appeal; that Rule 75 (e) of the Rules of Civil Procedure does not afford appellant relief under the circumstances, since it is unable to finance the record designated by the appellee; that appellant tendered with its original Designation of Record on Appeal a narrative statement of the testimony of ten witnesses; that appellee, without stating any specific objections to this narrative statement, designated the testimony in question and answer form of such witnesses and five others whose testimony was not material to the points stated by appellant; that thereafter appellant filed its First Amended Statement of Points omitting six of the original points and amending another so as to bring into issue the testimony of only one witness, Milton W. Stovall, whose verbatim testimony as a witness for appellee thereupon was designated by appellant; that in spite of the reduction in issues involved appellee then filed its Additional Designation of Record on Appeal including all items previously designated by appellee and four others, numbered (3) through (6) above, which could have no materiality in the absence of a cross-appeal that the reporter has estimated the cost of his transcript at $489.50 for the original and $222.50 for each carbon copy; that the cost of submitting the record on appeal in typewritten form would be in excess of $1,300.00, not counting the 1,430 pages of exhibits, including several hundred invoices, all of which have been designated by appellee; that the cost of submitting said record in printed form would be approximately $6,344.50, assuming that all exhibits can be reproduced by offset methods without being photographed, and substantially more if such photography is necessary;and that the elimination of the items designated by appellee to which appellant objects would reduce the cost of submitting the record in typewritten form to approximately $188.50 and the cost of submitting the record in printed form to approximately $370.00.

Appellant further moves the Court to dispense with the printing of the record on appeal and the appellant's briefs

due to its insolvency and for the additional reason that this case involves important and novel questions in the field of anti-trust law which should be decided by this Court, especially in view of the pendency of a similar suit against the same defendant in the Court below, as shown by the First Amended Statement of Points attached hereto and made a part hereof.

Dee C. Blythe
Hubert O. Robertson
Attorneys For Appellant

Filed Feb. 27, 1957.

Order For Diminution Of The Record.

This matter coming on for hearing before the undersigned Sam G. Bratton, Chief Judge, on appellant's Motion for Diminution of Record on Appeal and to Dispense with Printing of Record and Briefs of Appellant; the parties appearing by their respective counsel; and the Court, after arguments of counsel, having determined that said motion should be granted in part and denied in part as hereinafter provided in this Order; thereupon

It Is Ordered, as follows:

1. That the following portions of appellee's Additional Designation of Record on Appeal be denied:

"2. All of the exhibits which were introduced at the trial on the merits and which were received in evidence by the Court.

"3. All of the testimony of the following witnesses in the trial on the merits in question and answer form:

Robert Elgin, Joe B. Turner, Milton W. Stovall, Thomas W. Foy, Ervin H. Hahn, William Parish, William Russell, Harold Bishop, Howard Cearley, N. N. McCrary, J. V. Glenn, W. E. Johnson, Joe Hannawalt, Carl Hansen, R. R. Ellerson.

"4. Defendant's motion to dismiss at the close of the

plaintiff's case.

"5. Defendant's motion to dismiss at the close of all of the evidence."

2. That the following portions of appellant's First Amended Designation of Record on Appeal be and the same is withdrawn by the appellee and dismissed:

"11. The testimony in question and answer form of Milton W. Stovall when called as a witness for appellee."

3. That with respect to paragraphs 5 and 7 of the appellant's First Amended Designation of Record on Appeal relating to certain numbered Interrogatories by plaintiff to defendant and the answers thereto, the same shall be included in the record on appeal; but only for the purpose of enabling this Court to review the action of the District Court in denying the plaintiff's Amended Motion to Strike which is stated as the first Point of appellant's First Amended Statement of Points.

4. That Point 2 of appellant's First Amended Statement of Points be and the same hereby is, withdrawn by the appellant and dismissed.

5. That as a result of this Order the record on appeal be and it hereby is, diminished so as to include only the following:

(a) Pleadings as designated in paragraphs 1, 2, 3, 4, 8, 9 and 10 of appellant's First Amended Designation of Record on Appeal and by paragraph 8 of appellee's Additional Designation of Record on Appeal in response thereto.

(b) Interrogatories and answers thereto as designated in paragraphs 5 and 7 of appellant's First Amended Designation of Record on Appeal.

(c) Portion of pre-trial transcript as designated in paragraph 6.

(d) Plaintiff's requested instructions; the court's rulings thereon and plaintiff's objections thereto; and the

instructions given by the District Court all as designated by paragraphs 12, 13 and 14 of appellant's First Amended Designation of the Record on Appeal. The defendant's requested instructions; the court's rulings thereon and the defendant's objections to the same and to the instructions of the Court all as designated by paragraphs 6 and 7 of appellee's Additional Designation of Record on Appeal.

(e) Verdict, Judgment, Final Judgment and documents relating to appeal as designated by paragraphs 15 to 21 inclusive of appellant's First Amended Designation of Record on Appeal and by Paragraph 8 of Appellee's Additional Designation of Record on Appeal in response thereto.

6. That there be further included in the Record on Appeal the appellant's Motion for Diminution of Record on Appeal and this Order.

7. That the appellant's Motion to Dispense with Printing of Record and of the appellant's brief be, and the same hereby is, denied.

To all of which the appellee objects and excepts.

Sam G. Bratton
Chief Judge

Approved as to form: Dee C. Blythe, One of Plaintiff-Appellant's attorneys

Filed Feb. 27, 1957.

The Elgin Corporation vs. The Atlas Building Products Co.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Pleas And Proceedings Before The Honorable Carl A. Hatch, United States District Judge For The District Of New Mexico, Presiding In The Following Entitled Cause:

THE ELGIN CORPORATION, Plaintiff

vs.

THE ATLAS BUILDING PRODUCTS COMPANY,
Defendant

No. 3054, Civil

1] Complaint.

The plaintiff complains of the defendant and for its cause of action alleges:

1. That the cause of action herein alleged arises under and is based upon the laws of the United States, to-wit: Section 2 (a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C.A. § 13 (a); Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C.A. § 13a; and Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C.A. §15.

2. That plaintiff is a corporation organized and doing business under and by virtue of the laws of the state of New Mexico with its principal place of business at Silver City, New Mexico; and that it is and has been at all times material to this action engaged in the manufacture and wholesale and retail sales of concrete cinder building blocks and related building materials wholly within the state of New Mexico.

3. That defendant is a corporation organized under the laws of the state of Texas and authorized to do business under and by virtue of the laws of the state of New Mexico; that defendant has its principal place of business at El Paso,

Texas; and that John T. Watson, 50 Sena Plaza, Santa Fe, New Mexico, is the statutory agent of the defendant upon whom process may be served.

2] 4. That defendant at all times herein mentioned was and now is engaged in the manufacture and sale at wholesale of concrete cinder building blocks and other building materials in interstate commerce, to-wit: In the states of New Mexico and Texas; that at all times materials hereto defendant manufactured concrete cinder building blocks in El Paso, Texas, and sold same to dealers and building contractors in both New Mexico and Texas; and that said sales of concrete cinder building blocks in New Mexico by defendant were made in the course of interstate commerce and in direct competition with plaintiff.

5. That commencing early in the year 1948, on a date unknown to plaintiff, and continuing to the present, defendant, in the course of interstate commerce, systematically has sold concrete cinder building blocks in New Mexico to dealers and contractors at prices lower actually, or lower by reason of discounts and rebates, than those exacted by defendant for products of like grade and quality from purchasers in Texas for use, consumption or resale within the United States, and such constituted price discriminations; and that the effect of such price discriminations may be substantially to lessen competition or tend to create a monopoly in a line of commerce, or to injure, destroy or prevent competition by plaintiff with defendant and with persons who received the benefits of such discriminations, or with the customers of either of them.

6. That commencing early in the year 1948, on a date unknown to plaintiff, and continuing to the present, defendant in the course of interstate commerce systematically has sold concrete cinder building blocks in New Mexico to dealers and contractors at prices lower actually, or lower by reason of discounts and rebates, than those exacted by defendant for products of like grade and quality elsewhere in the United States for the purpose of destroying competition and eliminating competitors, particularly this plaintiff, in such part of the United States .

3] 7. That the principal products of the concrete cinder

building block business are 8" x 8" x 16" blocks known as open-end, corner, and steel sash corner blocks; that plaintiff is informed and believes, and therefore alleges, that defendant at all times mentioned herein has sold such standard type blocks to dealers and contractors at El Paso, Texas, at a price of 24 cents each f.o.b. defendant's plant in El Paso; that defendant has during said period sold such standard type blocks, manufactured in its plant at El Paso, Texas, to dealers in New Mexico at base prices varying from 18 to 24 cents each, less discounts which also varied, plus freight or haulage; that freight charges quoted by defendant, including 7 cents per block to Silver City, New Mexico, are less than actual cost of such freight, and defendant has absorbed part of said freight charges, resulting in a further discrimination in the delivered price of said products; that defendant adheres to no base price in bidding on contracts with building contractors in New Mexico but consistenly has underbid all competitors, including plaintiff, by any amount necessary to get such contracts, selling such standard type blocks, manufactured in its plant at El Paso, Texas, to contractors in New Mexico for delivered prices ranging from 20 to 22.5 cents each; that prices on other sizes and types of blocks sold by defendant in New Mexico were and are comparably low, as compared to prices exacted by defendant for products of like grade and quality in Texas; that said prices exacted by defendant in New Mexico frequently were and are below the cost of production plus transportation; and that said prices exacted by defendant in New Mexico are unreasonably low and were made for the purpose of destroying competition and eliminating com-
4] petitors, particularly this plaintiff; that such prices constitute price discriminations; and that the effect of such price discriminations may be substantially to lessen competition or tend to create a monopoly in a line of commerce, or to injure, destroy or prevent competition by plaintiff with defendant and with persons who received the benefit of such discriminations,or with customers of either of them.

8. That plaintiff is informed and believes, and therefore alleges, that defendant has committed other acts of price discrimination, the exact nature and details of which are within the knowledge of defendant, are unknown to plaintiff, and could not be discovered by plaintiff with the exercise of due diligence; and that defendant should be compelled

to make a full disclosure of same.

9. That as a result of the acts complained of plaintiff has been injured in its business and property in the sum of $75,000.00.

10. That by reason of the premises and of the unlawful acts of defendant, plaintiff's business has been injured, and unless defendant is enjoined from the commission of said acts plaintiff will suffer great and irreparable damages.

Wherefore, plaintiff prays:

(1) That it have judgment against the defendant for the injury to its business and property in the sum of $75,000.00.

(2) That the amount of said judgment be trebled by the Court as required by law.

(3) That the Court determine and there be added to said trebled judgment and made a part thereof a reasonable attorney's fee for the services of plaintiff's attorneys.

(4) That defendant be ordered to show cause, if any it has, why it should not be enjoined, pendente lite, from the commission of said acts complained of herein; that upon the hearing on said order to show cause the defendant, 5] its agents, servants and employees be enjoined and restrained from the commission of said acts complained of during the pendency of this action; and that upon the trial of this action on its merits the defendant, its agents, servants and employees be permanently enjoined from the commission of said acts complained of herein.

(5) That plaintiff have all his costs herein expended, and such other and further relief as the Court may find proper.

Dee C. Blythe
Hubert O. Robertson
Attorneys For Plaintiff

[Verified.]
Filed Jan. 4, 1956.

The Elgin Corporation vs. The Atlas Building Products Co.

6] Defendant's Answer To Plaintiff's Application For A Preliminary Injunction.

To The Honorable Judge Of Said Court:

Comes now The Atlas Building Products Co., a Delaware Corporation, and in answer to plaintiff's application and prayer for a preliminary injunction, pendente lite, says:

First Defense

That the plaintiff's application and prayer for a preliminary injunction fails to state a claim against defendant upon which relief can be granted and therefore the application and prayer should be denied.

Second Defense

(1) That this Corporation, being the party upon which process issued in this case was served, is not organized and doing business under the laws of the State of Texas, but is organized and doing business under the laws of the State of Delaware, and has a permit to do business in the State of New Mexico.

(2) That only a small portion of defendant's sales in New Mexico are made in competition with plaintiff.

(3) Defendant denies the allegations contained in paragraphs 5, 6, 8, 9, and 10 of plaintiff's complaint.

(4) Defendant agrees that the principal product in the concrete cinder building block business is the 8" x 8" x 16" block; but it says that it makes many other kinds and sizes of block, most of which plaintiff does not make. Defendant also says that it has bid with contractors on block for many jobs, and has obtained the contract to supply block on many of those jobs; and that defendant's prices have varied from time to time and place to place. Defendant knows of only one job on which it bid, and on which plaintiff also bid, and in that instance plaintiff was the successful bidder, but defendant was never advised of the price bid by plaintiff. Except as the foregoing statements relate to allegations

in paragraph 7 of plaintiff's complaint, all allegations in said paragraph 7 are denied.

7] Wherefore, defendant prays that plaintiff's application for a preliminary injunction be denied.

Burges, Scott, Rasberry & Hulse and
Rodey, Dickason, Sloan, Mims & Akin
By John P. Eastham
Attorneys For Defendant
Burges, Scott, Rasberry & Hulse
1100 First National Building
El Paso, Texas
Rodey, Dickason, Sloan, Mims & Akin
P. O. Box 558
Albuquerque, New Mexico

[Verified.]
Filed Jan. 19, 1956.

8] Affidavit.

The State Of Texas County Of El Paso ss

Before me the undersigned authority, a Notary Public in and for said County and State, on this 25th day of January, 1956, personally appeared Milton W. Stovall and Ervin H. Hahn, who having been by me duly sworn upon their respective oaths, say:

That Milton W. Stovall is Vice-President and General Manager of The Atlas Building Products Co., and that he has been an employee or an officer of said Company since January 25, 1948; that Ervin H. Hahn is Sales Manager of said The Atlas Building Products Co. and has been so employed since March 19, 1951. Affiants say that they each are familiar with the prices charged by said Company for its products including cinder concrete building block.

Affiants state that they each have read the complaint in the above cause, and with respect to the allegations therein contained concerning prices at which defendant sells said block in Texas and in New Mexico sayeth:

The Elgin Corporation vs. The Atlas Building Products Co.

It is alleged by plaintiff in paragraphs five and six of said complaint that beginning in 1948 defendant systematically sold or has sold the block in question to dealers and contractors in New Mexico at prices lower than the prices at which it has sold such block to purchasers in Texas; and that same constituted price discriminations which had the effect substantially to lessen competition or which would tend to create a monopoly or to injure, destroy or prevent competition by plaintiff with defendant and that the
9] alleged discrimination was for the purpose of destroying competition and eliminating competitors, and particularly the plaintiff.

Defendant has sold and sells to dealers and contractors in Texas at prices ranging from 17.5¢ to 21.6¢ f.o.b. plant. Defendant sells to dealers at Silver City, New Mexico, at a price of 18¢ f.o.b.plant, plus freight of 7¢ for a delivered price of 25¢. At the time plaintiff began doing business in 1948 defendant's price to Silver City dealers then was, and for ten months prior thereto, had been 18¢ f.o.b. plant, plus freight charged by railroads as deliveries were then being made by rail, and the delivered price in Silver City at that time was approximately 22¢. Defendant's dealers in Silver City sell to contractors at a price of 27¢ or more, and they sell to retail customers at a price of 30¢ or more. Prior to January 19, 1956, affiants did not know what prices were being charged and received by plaintiff, but on said date Mr. Elgin testified he sells the majority of his block direct, that is, to contractors or at retail, and that his prices to contractors is 26 1/2¢ and to retail customers is 28¢, both of said prices being lower than the price of defendant's block sold to such customers.

Defendant has bid on one job only at Silver Sity or within a radius of more than fifty miles of Silver City, towit, on the Cobre School job. Defendant bid 26¢ on said job and plaintiff bid 25¢ on said job, these bids being made in October, 1954, and plaintiff got the job to the exclusion of defendant.

Defendant has given no discounts or rebates on the prices hereinabove set out.

Affiants deny there are price discriminations as alleged in said paragraphs five and six in the complaint, and deny that defendant's prices cause any lessening of competition or any tendency to create a monopoly, or to injure, destroy or prevent competition by plaintiff with defendant. Affiants would here point out that the larger part of plaintiff's block is sold at a price of not over 26 1/2¢ and 28¢ respectively, in competition with the minimum price to the same class of customers for defendant's block of 27¢ and 30¢, respectively.

10] Affiants state that only a small portion of defendant's sales in New Mexico were, and are, made in competition with plaintiff.

In paragraph seven of said complaint it is alleged defendant sells said block to dealers and contractors at El Paso, Texas, at a price of 24¢ each f.o.b. plant. This statement is not true and it is hereby denied. Affiants say that defendant in fact sells to dealers and contractors in El Paso, Texas, at a price ranging from 18¢ to 21.6¢ f.o.b. plant. Defendant sells to dealers in Silver City, New Mexico, at a price of 25¢, being 18¢ f.o.b. plant plus 7¢ freight, and affiants say no discounts or rebates have been given on this price. It is alleged in said complaint that freight charges quoted by defendant including 7¢ per block to Silver City, New Mexico, and 3¢ per block to one mile beyond Las Cruces, New Mexico, are less than the actual cost of such freight, and that defendant has absorbed part of said freight cost. These allegations are untrue and are hereby denied, and affiants further say in that respect that defendant has not hauled block for a price less than the actual cost of hauling said block, and that it has not absorbed any part of freight charges for hauling said block.

Affiants deny that defendant has consistently underbid plaintiff, and say that so far as they know defendant has bid on only one job plaintiff bid on, towit, the Cobre School job, where plaintiff underbid defendant and plaintiff got the job.

Affiants deny that defendant has sold block to contractors in the Silver City area for delivered prices ranging from 20.0¢ to 22.5¢ each, and deny it sold other

sizes and types of block in the Silver City area for comparably low prices.

11] Affiants also deny the allegation in said complaint that the prices exacted by defendant in New Mexico frequently were and are below the cost of production plus transportation and in this connection further say that no block had been sold in New Mexico at a price below the cost of production and that no block had been transported by it in New Mexico at a price below the cost of hauling same.

Affiants deny the allegation in said complaint that the prices exacted by defendant in New Mexico are unreasonably low and were made for the purpose of destroying competition and eliminating competitors particularly this plaintiff; and that the effect of such price discrimination may be substantially less in competition or tend to create a monopoly or to injure, destroy or prevent competition by plaintiff with defendant. Affiants say that the prices hereinabove set out show there has not been any price discrimination as alleged by plaintiff in its complaint.

Approximately five years ago, the retail price f.o.b. plant was raised from 22¢ to 24¢ and prior to that time the same pricing policies were pursued as herein set out but with adjustment for a lower price on a 22¢ retail base.

Affiants specifically deny the allegation in the complaint that plaintiff will suffer irreparable damages if a preliminary injunction is not granted.

Futher affiants sayeth not.

Milton W. Stovall
Ervin H. Hahn

Subscribed And Sworn To before me, by the said Milton W. Stovall and Ervin H. Hahn, this the 25th day of January, 1956.

Gladys Horton
Notary Public in and for
El Paso County, Texas

Filed Jan. 30, 1956.

12] Defendant's Original Answer.

To The Honorable Judge Of Said Court:

Comes now The Atlas Building Products Co., a Delaware Corporation, and in answer to plaintiff's complaint herein, says:

First Defense

That the plaintiff's Bill of Complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

(1) Defendant denies all the allegations contained in paragraphs 5, 6, 8, 9 and 10 of plaintiff's Bill of Complaint.

(2) Defendant agrees that the principal product in the concrete cinder building block business is the 8" x 8" x 16" block; but it says that it makes many other kinds and sizes of block most of which plaintiff does not make. Defendant also says it has bid with contractors on block and many jobs and has obtained the contract to supply block on many of those jobs, and that defendant's prices have varied from time to time and place to place. Defendant knows of only one job on which it bid and on which plaintiff also bid, and in that instance plaintiff was the successful bidder, but defendant was never advised of the price bid by plaintiff. Except as the foregoing statements relate to allegations in paragraph 7 of plaintiff's complaint, all
13] allegations in paragraph 7 are denied. Defendant particularly alleges that it has not sold block at less than cost, nor has it transported or caused to be transported block at less than cost; and that it has not given discounts or rebates off of the price at which it has sold block to its customers in New Mexico.

(3) Defendant says that only a small part of the block sold by it in New Mexico have been sold in competition with plaintiff.

(4) Defendant denies that it systematically has sold

to dealers and contractors in New Mexico at prices lower than prices at which sales were made by defendant in Texas to dealers and contractors either by reason of actual lower prices or by reason of discounts and rebates. Defendant says that its sales to contractors in the area in which plaintiff does business have been for prices as high as the prices at which a large and substantial part of the defendant's sales to contractors in Texas have been made and were sold at prices higher than the prices at which plaintiff sold or offered to sell. Defendant further says that it has not so far as it knows sold to dealers below the price at which plaintiff sold to dealers and in this connection further says, that prior to the time of the filing of this suit, plaintiff had not known at what price or prices plaintiff sold to dealers or contractors. Defendant further says that generally speaking, defendant's block has been sold in the Silver City area at a price higher than plaintiff's block has been sold or offered for sale in said area; and defendant further says it generally has been able to sell and has sold its block in the Silver City area for a higher price than plaintiff sold or offered to sell its block; and that factors other than price entered into defendant making its said sales at such higher prices such as, but not limited to, the quality of the respective block.

(5) Defendant denies that it has done any acts the effect of which may be substantially to lessen competition or tend to create a monopoly in a line of commerce or to injure, destroy or prevent competition by plaintiff with defendant, and further says that no legal liability for damages is imposed by law upon defendant for any acts which "may" result in certain conditions or which "tend" towards certain conditions, as acts which "may" result in, or "tend" toward certain conditions also "may not" result in or "tend" toward such conditions, and are, therefore, not illegal; and a tendency toward a condition which is illegal is not unlawful, but is unlawful only if acts are done with the intent they shall result, or actually do result, in the proscribed conditions; and plaintiff may not recover any damages unless as a proximate result of acts which are unlawful, plaintiff has suffered actual damages.

Third Defense

Comes now defendant and pleads in bar of the alleged

cause of action asserted by plaintiff the four-year statute of limitation of the Statutes of Limitation of the State of New Mexico, which four-year statute is here specially plead in bar of said alleged cause of action asserted by plaintiff.

Fourth Defense

Comes now defendant and specially pleads in bar of the alleged cause of action asserted by plaintiff the statute of limitation contained in the Acts of the Eighty-fourth Congress of the United States of America, being chapter 283-Public Law 137, of the Acts of the Eighty-fourth Congress.

Wherefore, defendant prays that it have judgment of the Court that the plaintiff take nothing by its suit, and that judgment be entered in favor of the defendant.

15] Burges, Scott, Rasberry & Hulse
And
Rodey, Dickason, Sloan, Mims & Akin,
By Judson C. Akin
Attorneys for Defendant, The
Atlas Building Products Co.

Filed Feb. 29, 1956.

16] Interrogatories By Plaintiff To Defendant.

The plaintiff requests that the defendant corporation, by an officer or agent thereof, answer under oath, in accordance with Rule 33 of the Rules of Civil Procedure, the following interrogatories:

* * * * *

19] 26. What are defendant corporation's dealer list prices f.o.b. plant and delivery charge published or quoted to dealers in El Paso, Texas, for each of the types of concrete cinder building blocks it manufactures, and what were such prices and charges during each of the years 1947 through 1955?

27. What discount or discounts are customarily given

by defendant corporation to dealers in El Paso, Texas?

20] 28. Has defendant corporation ever given any special discounts, rebates or other benefits to any dealer or dealers in El Paso, Texas? If so, state to whom and when each was given, the character and amount thereof, and the quantity of the sale on which it was given.

29. Does defendant corporation sell direct to building contractors and individuals other than dealers in the El Paso area?

30. If the answer to Interrogatory No. 29 is affirmative, what are defendant corporation's list price f.o.b. plant and delivery charge to such contractors and individuals for each of the types of concrete cinder building blocks it manufactures, and what were such prices and charges during each of the years 1947 through 1955?

31. What discount or discounts are customarily given by defendant corporation to building contractors in El Paso, Texas?

32. Has defendant corporation ever given any special discounts, rebates or other benefits to any contractor or contractors in El Paso, Texas? If so, state to whom and when each was given, the character and amount thereof, and the quantity of the sale on which it was given.

* * * * *

35. What are defendant corporation's dealer list prices and transportation charges published or quoted to dealers for each of the types of concrete cinder building blocks it manufactures, and what were such prices and charges during each of the years 1947 through 1955, in each of the following cities:

21] (a) Las Cruces, New Mexico;

(b) Alamogordo, New Mexico;

(c) Deming, New Mexico;

(d) Silver City, New Mexico;

(e) Lordsburg, New Mexico;

(f) Bayard, New Mexico;

36. What discount or discounts are customarily given by defendant corporation to dealers in each of the cities listed in Interrogatory No. 35?

37. Has defendant corporation ever given any special discounts, rebates or other benefits to any dealer or dealers in any of the cities listed in Interrogatory No. 35? If so, state to whom and when each was given, the character and amount thereof, and the quantity of the sale on which it was given.

* * * * *

39. What are defendant corporation's list prices, if any, and transportation charges, to building contractors in New Mexico, and what were such prices during the years 1947 through 1955, for each of the types of concrete cinder building blocks it manufactures, in each of the following areas:

(a) Las Cruces, New Mexico;

(b) White Sands Proving Ground, New Mexico;

(c) Holloman Air Force Base, New Mexico;

(d) Alamogordo, New Mexico;

(e) Deming, New Mexico;

(f) Silver City, New Mexico;

(g) Lordsburg, New Mexico;

(h) Bayard, New Mexico;

22] 40. Has defendant corporation ever given any special discounts, rebates or other benefits to any contractor or contractors in New Mexico, or on blocks sold in El Paso for use in New Mexico? If so, state to whom and when each

was given, the character and amount thereof, and the quantity of the sale on which it was given.

Please take notice that a copy of such answers must be served upon the undersigned within 15 days after the service of these interrogatories.

Dated: March 5, 1956.

Dee C. Blythe
Hubert O. Robertson
Attorneys For Plaintiff

Filed March 6, 1956.

24] Defendant's Answers To Plaintiff's Interrogatories.

Defendant answer those interrogatories filed by plaintiff and not objected to by defendant, as follows:

* * * * *

25] Answer to Interrogatory No. 26:

Defendant has no dealer price list. Delivery charge is shown on retail price lists attached hereto.

Answer to Interrogatory No. 27:

No discounts are customarily given off the dealer price.

Answer to Interrogatory No. 29:

Yes.

Answer to Interrogatory No. 30:

The price lists attached are retail price lists, and are the only price lists f.o.b. plant which defendant has now, or has had; except for a retail price list in 1947 and 1949, copies of which defendant cannot now locate.

The Elgin Corporation vs. The Atlas Building Products Co.

Answer to Interrogatory No. 31:

No discounts are customarily given contractors at El Paso, Texas. Defendant's prices to contractors usually are set by bids or by negotiation of the price.

Burges, Scott, Rasberry & Hulse,
Rodey, Dickason, Sloan, Mims & Akin,
By J. F. Hulse
Attorneys for Defendant
John P. Eastham

26] The State Of Texas County Of El Paso

Before Me, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared Milton W. Stovall, who having been by me first duly sworn says that he is Vice-President of The Atlas Building Products Co., and has knowledge of the facts herein stated; that the answers hereinabove set out are true and correct.

Milton W. Stovall

Subscribed And Sworn To by the said Milton W. Stovall before me, this 20th day of March, 1956, to certify which witness my hand and seal of office.

(Seal)

Gladys Horton
Notary Public in and for
El Paso County, Texas.

My commission expires June 1, 1957

(p. 22 BLANK)

THE ATLAS BUILDING PRODUCTS CO.

P. O. BOX 601 El Paso, Texas Phone PR 2-1451

F.O.B. Price List

February 1, 1954

Atlas Cinder Concrete Block Manufactured to Federal & A. S. T. M. Specifications

Unit Number	Nominal Unit Size in inches	Description	Unit Price F.O.B. Plant	Weight (lbs.)	Delivery charge per block (cents) ZONES:						
					1	2	3	4	5	6	7
3-1	3x8x16	Partition	.11	12	1	1½	2	2	1½	2	2
3-2	3x8x16	Solid	.14	16	1	1½	2	2	1½	2	2
4-1	4x8x16	Partition	.14	15	1	1½	2	2	1½	2	2
4-2	4x8x8	Half Partition	.075	8	3/4	1	1½	1½	1	1½	1½
4-6	4x8x16	Solid Slab	.16	20	1½	2	2½	3	2	2½	3
4-9	4x4x16	Solid Slab	.10	8	3/4	1	1½	1½	1	1½	1½
6-1	6x8x16	Partition	.18	18	1	1½	2	2	1½	2	2
6-2	6x8x16	Partition Steel Sash	.18	18	1	1½	2	2	1½	2	2
6-3	6x8x14	Partition, Special Corner	.18	16	1	1½	2	2	1½	2	2
6-4	6x8x8	Half Partition	.095	13	3/4	1	1½	1½	1	1½	1½
6-5	6x8x16	Solid Slab	.23	28	1½	2	2½	3	2	2½	3
6-7	6x8x8	Lintel, Plain	.155	10	3/4	1	1½	1½	1	1½	1½
6-8	6x8x8	Lintel, Steel Sash	.155	10	3/4	1	1½	1½	1	1½	1½
8-1	8x8x16	Open Ends	.24	27	1½	2	2½	3	2	2½	3
8-2	8x8x16	Corner	.24	28	1½	2	2½	3	2	2½	3
8-3	8x8x16	Steel Sash Corner	.24	28	1½	2	2½	3	2	2½	3
8-4	8x8x16	Double End	.265	29	1½	2	2½	3	2	2½	3
8-5	8x8x8	Half Corner	.12	15	3/4	1	1½	1½	1	1½	1½
8-6	8x8x16	Double End Steel Sash & Column	.265	28	1½	2	2½	3	2	2½	3
8-7	8x8x8	Half Open End	.12	14	3/4	1	1½	1½	1	1½	1½
8-8	8x8x16	Jamb & Joist	.275	31	1½	2	2½	3	2	2½	3
8-9	8x8x8	Half Jamb & Joist	.14	17½	3/4	1	1½	1½	1	1½	1½
8-11	8x8x16	Bond Beam	.265	30	1½	2	2½	3	2	2½	3
8-12	8x8x8	Lintel, Plain	.185	15	3/4	1	1½	1½	1	1½	1½
8-13	8x8x8	Lintel, Steel Sash	.185	15	3/4	1	1½	1½	1	1½	1½
8-14	8x16x8	Lintel, Plain & Steel Sash	.27	29	1½	2	2½	3	2	2½	3
8-15	8x8x16	6" Wall Column	.265	28	1½	2	2½	3	2	2½	3
8-16	8x8x16	Bull Nose, Plain, 2" Radius	.265	29	1½	2	2½	3	2	2½	3
8-17	8x8x8	Half Bull Nose, Plain 2" Radius	.135	17	3/4	1	1½	1½	1	1½	1½
8-18	8x8x16	Bull Nose, Steel Sash, 2" Radius	.265	29	1½	2	2½	3	2	2½	3
8-19	8x8x8	Half Bull Nose, S/Sash, 2" Radius	.135	17	3/4	1	1½	1½	1	1½	1½
8-22	8x8x16	Bull Nose, Plain, 8" Radius	.27	27	1½	2	2½	3	2	2½	3
8-23	8x8x8	Half Bull Nose, Plain, 8" Radius	.14	15	3/4	1	1½	1½	1	1½	1½
8-24	8x8x4	Quarter Steel Sash	.075	8	3/4	1	1½	1½	1	1½	1½

(p. 24 BLANK) (p. 25)

THE ATLAS BUILDING PRODUCTS CO.

P. O. Box 601 El Paso, Texas Phone PR 2-1451

F. O. B. Price List — February 1, 1954

Atlas Cinder Concrete Block Manufactured to Federal & A.S.T.M. Specifications

Unit Number	Nominal Unit Size in inches	Description	Unit Price F.O.B. Plant	Weight (lbs.)	Delivery charge per block (cents) ZONES:						
					1	2	3	4	5	6	7
8-25	8x8x12	Three Quarter Steel Sash	.20	24	1½	2	2½	3	2	2½	3
8-28	8x12x8	Lintel Plain or Steel Sash	.24	25	1½	2	2½	3	2	2½	3
8-41	8x4x16	Regulars	.16	15	1	1½	2	2	1½	2	2
8-43	8x4x16	Steel Sash Corner	.16	15	1	1½	2	2	1½	2	2
8-44	8x4x16	Double End	.175	17	1	1½	2	2	1½	2	2
8-45	8x4x8	Half Corner	.085	10	3/4	1	1½	1½	1	1½	1½
12-1	12x8x16	Open End	.35	40	2½	3	3½	4	3	3½	4
12-2	12x8x16	Corner	.35	42	2½	3	3½	4	3	3½	4
12-3	12x8x16	Steel Sash	.35	42	2½	3	3½	4	3	3½	4
12-4	12x8x16	Double End	.37	44	2½	3	3½	4	3	3½	4
12-5	12x8x8	Half Corner	.20	24	1½	2	2½	3	2	2½	3
12-8	12x8x16	Special Corner	.37	38	2½	3	3½	4	3	3½	4
12-9	12x8x16	Bond Beam	.37	44	2½	3	3½	4	3	3½	4
12-10	12x8x8	Lintel Plain	.22	17	1½	2	2½	3	2	2½	3
12-11	12x8x8	Lintel Steel Sash	.22	17	1½	2	2½	3	2	2½	3
12-12	12x16x8	Lintel, Plain & Steel Sash	.37	42	2½	3	3½	4	3	3½	4
S-1	2x8x16	Solid Slab Stepping Stone	.10	12	1	1½	2	2	1½	2	2
S-2	8x4x10	Window Sill	.22	12½	3/4	1	1½	1½	1	1½	1½
S-3	8x4x14	Sill Block 12" Wall	.34	14	1	1½	2	2	1½	2	2
B-1	2-1/4x4x8	Modular Brick	23.00M	3	1.50/M	2.00	2.50	3.00	2.00	2.50	3.00
H-1	8x8x16	Header Block Open End	.265	27	1½	2	2½	3	2	2½	3
H-2	8x8x16	Header Block Corner	.265	27	1½	2	2½	3	2	2½	3
24-6	6x8x24	Soffit	.34	33	2½	3	3½	4	3	3½	4
24-8	8x8x24	Soffit	.39	38	2½	3	3½	4	3	3½	4
C-1		Column, Center Wall	.75	50	3	4	5	6	4	5	6
C-2		Column, Flush	.75	50	3	4	5	6	4	5	6
C-3		Column, Outside Corner	.75	50	3	4	5	6	4	5	6
C-4		Column, Inside Corner	.75	50	3	4	5	6	4	5	6

Zone 1 - From El Paso to 1 Mile East of Ysleta

Zone 2 - From Ysleta to 1 Mile East of Clint

Zone 3 - From Clint to Fabens to 1 Mile E.of Tornillo

Zone 4 - From Tornillo to 1 Mile East of Ft. Hancock

Zone 5-To the Crossroads. Including Country Club District Only.

Zone 6 - To Canutillo and to 1 Mile North of Anthony

Zone 7 - From N.M. Checking Station to 1 Mile Beyond Las Cruces

THE ATLAS LIME COMPANY

EL PASO, TEXAS

(P. 26 BLANK)

PRICE LIST 550, FOB PLANT, EL PASO

ATLAS CINDER

Unit Number	BLOCK SIZE — DESCRIPTION	Block Cost FOB Plant (Cents)	Blocks per Ton	DELIVERY CHARGE PER BLOCK (Cents)						
				Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7
3-1	3x8x16 Partition	.11	12	1	1½	2	2	1½	2	2
4-1	4x8x16 Partition	.14	15	1	1½	2	2	1½	2	2
4-2	4x8x8 Half Partition	.075	8	¾	1	1½	1½	1	1½	1½
4-6	4x8x16 Solid Slab	.16	20	1½	2	2½	3	2	2½	3
4-7	4x8x8 Half Solid Slab	.09	10	¾	1	1½	1½	1	1½	1½
6-1	6x8x16 Partition	.18	18	1	1½	2	2	1½	2	2
6-2	6x8x16 Partition, Steel Sash	.18	18	1	1½	2	2	1½	2	2
6-3	6x8x14 Partition, Spec. Corner	.18	18	1	1½	2	2	1½	2	2
6-4	6x8x8 Half Partition	.095	13	¾	1	1½	1½	1	1½	1½
6-7	6x8x8 Lintel & Tie Beam, Plain	.155	10	¾	1	1½	1½	1	1½	1½
6-8	6x8x8 Lintel & Tie Beam, Steel Sash	.155	10	¾	1	1½	1½	1	1½	1½
8-1	8x8x16 Open Ends	.24	27	1½	2	2½	3	2	2½	3
8-2	8x8x16 Corner	.24	28	1½	2	2½	3	2	2½	3
8-3	8x8x16 Steel Sash	.24	28	1½	2	2½	3	2	2½	3
8-4	8x8x16 Double End	.285	29	1½	2	2½	3	2	2½	3
8-5	8x8x8 Half	.12	15	¾	1	1½	1½	1	1½	1½
8-8	8x8x16 Jamb & Joist	.275	31	1½	2	2½	3	2	2½	3
8-9	8x8x8 Half Jamb & Joist	.14	17½	¾	1	1½	1½	1	1½	1½
8-11	8x8x16 Lintel & Tie Beam	.285	30	1½	2	2½	3	2	2½	3
8-12	8x8x8 Lintel & Tie Beam, Plain	.185	15	¾	1	1½	1½	1	1½	1½
8-13	8x8x8 Lintel & Tie Beam, Steel Sash	.185	15	¾	1	1½	1½	1	1½	1½
8-16	8x8x16 Bull Nose, Plain 2" Radius	.225	28	1½	2	2½	3	2	2½	3

ZONE 1—El Paso to 1 Mile East of Ysleta
ZONE 2—From Ysleta to 1 Mile East of Clint
ZONE 3—From Clint to Fabens to 1 Mile East of Tornillo
ZONE 4—From Tornillo to 1 Mile East of Ft. Hancock

(P. 27)

LOWER

-CONCRETE BLOCK

Unit Number	BLOCK SIZE — DESCRIPTION	Block Cost FOB Plant (Cents)	Weight Per Block	DELIVERY CHARGE PER BLOCK (Cents)						
				Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7
8-17	8x8x8 Half Bull Nose, Plain 2" Radius	.135	17	½	1	1½	1½	1	1½	1½
8-18	8x8x16 Bull Nose, Steel Sash, 2" Radius	.265	29	1½	2	2½	3	2	2½	3
8-19	8x8x8 Bull Nose, Steel Sash, 2" Radius	.135	17	½	1	1½	1½	1	1½	1½
8-22	8x8x16 Bull Nose, Plain, 2" Radius	.27	27	1½	2	2½	3	2	2½	3
8-23	8x8x8 Bull Nose, Plain, 2" Radius	.14	15	½	1	1½	1½	1	1½	1½
12-1	12x8x16 Open End	.35	40	2½	3	3½	4	3	3½	4
12-2	12x8x16 Corner	.35	42	2½	3	3½	4	3	3½	4
12-3	12x8x16 Steel Sash	.35	42	2½	3	3½	4	3	3½	4
12-4	12x8x16 Double End	.37	44	2½	3	3½	4	3	3½	4
12-5	12x8x8 P-M & Corner	.20	24	1½	2	2½	3	2	2½	3
12-8	12x8x16 Special Corner	.37	30	2½	3	3½	4	3	3½	4
12-10	12x8x8 Lintel & Tie Beam, Plain	.22	17	1½	2	2½	3	2	2½	3
12-11	12x8x8 Lintel & Tie Beam, Steel Sash	.22	17	1½	2	2½	3	2	2½	3
S-1	1½x8x16 Solid Slab, Stepping Stone	.10	12	1	1½	2	2	1½	2	2
S-2	8x4x10 Window Sill & Coping	.22	12½	¾	1	1½	1½	1	1½	1½
B-1	2¼x4x8 Modular Brick		3							
24-6	6x8x24 Soffit	.34	33							
24-8	8x8x24 Soffit	.50	38	2½	3	3½	4	3	3½	4
6-L	6" Precast Lintel, per Lin. Ft.	.70								
8-L	8" Precast Lintel, per Lin. Ft.	.80								
12-L	12" Precast Lintel, per Lin. Ft.	1.10								

ZONE 5—To the Crossroads, including Country Club District only
ZONE 6—To Canutillo and to 1 Mile North of Anthony
ZONE 7—From N. Mex. Checking Station to 1 Mile beyond Las Cruces

This price list also applies to Bayard.

Quoted Prices to Dealers on 8x8x16 block:

	Deming		Silver City		Lordsburg		Bayard		
	Blk Price	Trans.	Blk Price	Trans.	Blk Price	Trans.	Blk	Price	Trans.
1947	18¢ 17.82¢	---	17.82¢	7¢	19.8¢	---	Same as Silver City		
1948	"	---	"	"	17.82¢	---	"	"	"
1949	"	6¢	"	"	"	---	"	"	"
1950	17.82¢ 19.44¢	6¢	16.929¢ 18.468¢	" 7¢	19.44¢	----	"	"	"
1951	19.44¢	6¢	"	"	"	---	"	"	"
1952	17.496¢	5¢	List Price Attached		"	---	List Price Attached		
1953	"	"			"	---			
1954	"	"			"	---			
1955	"	"			"	---			

NO. 36:

Defendant customarily does not give to dealers any discount from the prices which it quotes to dealers in the cities listed in Interrogatory Number 35.

NO. 39:

Defendant has no list prices published to building contractors in New Mexico. Defendant's prices to building contractors in New Mexico have been quoted to the contractors on each job when such job was being bid by the contractors. Transportation charges were quoted at the same time, and usually were the transportation charges shown in the answer to Interrogatory Number 35.

NOS. 28, 32, 37, 40:

Defendant has given no rebates or special benefits to dealers or contractors in El Paso, Texas, or in New Mexico.

Defendant has given very few special discounts. It lists such discounts to dealers or contractors as follows:

40] Defendant's Answers To Interrogatories
Numbers 25, 28, 32, 35, 36, 37, 39 and 40.

* * * * *

No. 35:

We have no dealer list price published to dealers, except one for dealers in Silver City, copy of which is attached. It has been in effect since 1952.

42] In connection with the Field House Job, at New Mexico Western College, Silver City, New Mexico, in 1949, defendant gave to a dealer, the Silver City Lumber Company, a price of 16.03¢ for 8 x 8 x 16 block compared with 17.82¢ which was at that time the customary price to dealers in Silver City. Said dealer took delivery of said block at defendant's plant in El Paso, Texas.

Defendant has quoted contractors on each job the contractors were bidding on, and there was a quoted price for block, on each such job; and said prices varied from time to time.

In addition to what is set out above, defendant has given some special discounts, which were given to the owner of the building in question, and not to a dealer or contractor. These discounts were given to churches, and to civic organizations such as the Boy Scouts of America, a civic recreation center, a school for retarded children, the Lighthouse for the Blind, and while the discount may or may not show up on the invoices to the dealer, it was given to the organization building the structure in question, and not to a dealer or contractor, in each instance. Such discounts were given to churches both in El Paso, Texas, and in New Mexico; and those to the civic organizations were given in El Paso, Texas.

The above answer covers all discounts given by defendant which affiant, after carefully searching his memory, can recall, and affiant is certain that this answer is substantially correct.

Milton W. Stovall, Vice-President
The Atlas Building Products Co.

Subscribed And Sworn To before me by the said Milton W. Stovall, this 14th day of April, 1956, to certify which witness my hand and seal of office.

(Seal)

Gladys Horton
Notary Public in and for
El Paso County, Texas

My commission expires June 1, 1957

Filed April 17, 1956

43] Defendant's Answers To Plaintiff's Interrogatories Nos. 26 and 35.

(Plaintiff's Exhibit 19.)

In answer to Interrogatories Nos. 26 and 35, Defendant attaches hereto six Tables or Schedules marked for identification, respectively, Nos. A, B, C, D, E and F.

Burges, Scott, Rasberry & Hulse
Rodey, Dickason, Sloan, Mims & Akin
By J. F. Hulse
Attorneys for Defendant

The State Of Texas County Of El Paso

Before Me, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared Milton W. Stovall, who having been by me first duly sworn says that he is Vice-President of The Atlas Building Products Co., and has knowledge of the facts herein stated; that the answers hereinabove set out are true and correct.

Milton W. Stovall

Subscribed And Sworn To by the said Milton W. Stovall before me, this 25th day of June, 1956, to certify which witness my hand and seal of office.

(Seal)

Marguerite B. Haight
Notary Public in and for El Paso County, Texas.

My commission expires June 1 - 1957

Filed June 27, 1956.

EL PASO

Nominal Unit Size In Inches	Description	1950	1951	1952	1953	1954	1955	Delivery
3x8x16	Partition	.0990	.0990	.0990	.0990	.0990	.0990	.0100
3x8x16	Solid			.1260	.1260	.1260	.1260	.0100
4x8x16	Partition	.1260	.1260	.1260	.1260	.1260	.1260	.0100
4x8x8	Partition	.0675	.0675	.0675	.0675	.0675	.0675	.0075
4x8x16	Solid	.1440	.1440	.1440	.1440	.1440	.1440	.0150
4x4x16	Solid					.0900	.0900	.0075
6x8x16	Partition	.1620	.1620	.1620	.1620	.1620	.1620	.0100
6x8x16	Partition S/S	.1620	.1620	.1620	.1620	.1620	.1620	.0100
6x8x14	Partition	.1620	.1620	.1620	.1620	.1620	.1620	.0100
6x8x8	Partition	.0855	.0855	.0855	.0855	.0855	.0855	.0075
6x8x16	Solid			.2070	.2070	.2070	.2070	.0150
6x8x8	Lintel Plain	.1395	.1395	.1395	.1395	.1395	.1395	.0075
6x8x8	Lintel S/S	.1395	.1395	.1395	.1395	.1395	.1395	.0075
8x8x16	Open End	.2160	.2160	.2160	.2160	.2160	.2160	.0150
8x8x16	Corner	.2160	.2160	.2160	.2160	.2160	.2160	.0150
8x8x16	S/S Corner	.2160	.2160	.2160	.2160	.2160	.2160	.0150
8x8x16	Double End	.2385	.2385	.2385	.2385	.2385	.2385	.0150
8x8x8	Corner	.1080	.1080	.1080	.1080	.1080	.1080	.0075
8x8x16	D/E S/S & Col.			.2385	.2385	.2385	.2385	.0150
8x8x8	Open End					.1080	.1080	.0075
8x8x16	Jamb & Joist	.2475	.2475	.2475	.2475	.2475	.2475	.0150
8x8x8	Jamb & Joist	.1260	.1260	.1260	.1260	.1260	.1260	.0075
8x8x16	Bond Beam	.2385	.2385	.2385	.2385	.2385	.2385	.0150
8x8x8	Lintel Plain	1665	.1665	.1665	.1665	.1665	.1665	.0075
8x8x8	Lintel S/S	.1665	.1665	.1665	.1665	.1665	.1665	.0075
8x16x8	Lintel Pl. & S/S			.2430	.2430	.2430	.2430	.0150
8x8x16	6" Wall Column			.2385	.2385	.2385	.2385	.0150
8x8x16	B/N Pl. 2" Rad.	.2385	.2385	.2385	.2385	.2385	.2385	.0150
8x8x8	B/N Pl. 2" Rad.	.1215	.1215	.1215	.1215	.1215	.1215	.0075
8x8x16	B/N S/S 2" Rad.	.2385	.2385	.2385	.2385	.2385	.2385	.0150
8x8x8	B/N S/S 2" Rad.	.1215	.1215	.1215	.1215	.1215	.1215	.0075
8x8x16	B/N Pl. 8" Rad.	.2430	.2430	.2430	.2430	.2430	.2430	.0150
8x8x8	B/N Pl. 8" Rad.	.1260	.1260	.1260	.1260	.1260	.1260	.0075

EL PASO (cont.)

Nominal Unit Size In Inches	Description	1950	1951	1952	1953	1954	1955	Delivery
8x8x4	S/Sash					.0675	.0675	.0075
8x8x12	S/Sash					.1800	.1800	.0150
8x12x8	Lintel Pl. or S/S					.2160	.2160	.0150
8x4x16	Regular			.1440	.1440	.1440	.1440	.0100
8x4x16	S/S Corner			.1440	.1440	.1440	.1440	.0100
8x4x16	Double End			.1575	.1575	.1575	.1575	.0100
8x4x8	Corner			.0765	.0765	.0765	.0765	.0075
12x8x16	Open End	.3150	.3150	.3150	.3150	.3150	.3150	.0250
12x8x16	Corner	.3150	.3150	.3150	.3150	.3150	.3150	.0250
12x8x16	S/Sash	.3150	.3150	.3150	.3150	.3150	.3150	.0250
12x8x16	Double End	.3330	.3330	.3330	.3330	.3330	.3330	.0250
12x8x8	Corner	.1800	.1800	.1800	.1800	.1800	.1800	.0150
12x8x16	Spec. Corner	.3330	.3330	.3330	.3330	.3330	.3330	.0250
12x8x16	Bond Beam					.3330	.3330	.0250
12x8x8	Lintel Plain	.1980	.1980	.1980	.1980	.1980	.1980	.0150
12x8x8	Lintel S/S	.1980	.1980	.1980	.1980	.1980	.1980	.0150
12x16x8	Lintel Pl. & S/S				.3330	.3330	.3330	.0250
2x8x16	S/Stone	.0900	.0900	.0900	.0900	.0900	.0900	.0100
8x4x10	Sill	.1980	.1980	.1980	.1980	.1980	.1980	.0075
8x4x14	Sill 12" Wall					.3060	.3060	.0100
2 1/4x4x8	Mod. Brick	.0207	.0207	.0207	.0207	.0207	.0207	.0015
8x8x16	Header O.E.					.2385	.2385	.0150
8x8x16	Header Corner					.2385	.2385	.0150
6x8x24	Soffit	.3060	.3060	.3060	.3060	.3060	.3060	.0250
8x8x24	Soffit	.3510	.3510	.3510	.3510	.3510	.3510	.0250
C-1	Column	.6750	.6750	.6750	.6750	.6750	.6750	.0300
C-2	Column			.6750	.6750	.6750	.6750	.0300
C-3	Column				.6750	.6750	.6750	.0300
C-4	Column				.6750	.6750	.6750	.0300

(P. 36 BLANK)

SILVER CITY and Bayard

Nominal Unit Size In Inches	Description	1950	1951	1952	1953	1954	1955	Delivery
3x8x16	Partition	.084645	.084645	.084645	.0825	.0825	.0825	.0300
3x8x16	Solid			.10773	.1050	.1050	.1050	.0350
4x8x16	Partition	.10773	.10773	.10773	.1050	.1050	.1050	.0350
4x8x8	Partition	.0577125	.0577125	.0577125	.05625	.05625	.0525	.0175
4x8x16	Solid	.12312	.12312	.12312	.1200	.1200	.1200	.0525
6x8x16	Partition	.13851	.13851	.13851	.1350	.1350	.1350	.0525
6x8x16	Partition S/S	.13851	.13851	.13851	.1350	.1350	.1350	.0525
6x8x14	Partition	.13851	.13851	.13851	.1350	.1350	.1350	.0525
6x8x8	Partition	.0731025	.0731025	.0731025	.07125	.07125	.07125	.0265
6x8x16	Solid			.176985	.1725	.1725	.1725	.0700
6x8x8	Lintel Plain	.1192725	.1192725	.1192725	.11625	.11625	.11625	.0265
6x8x8	Lintel S/S	.1192725	.1192725	.1192725	.11625	.11625	.11625	.0265
8x8x16	Open Ends	.18468	.18468	.18468	.1800	.1800	.1800	.0700
8x8x16	Corner	.18468	.18468	.18468	.1800	.1800	.1800	.0700
8x8x16	S/S Corner	.18468	.18468	.18468	.1800	.1800	.1800	.0700
8x8x16	Double End	.2039175	.2039175	.2039175	.19875	.19875	.19875	.0700
8x8x8	Corner	.09234	.09234	.09234	.0900	.0900	.0900	.0350
8x8x16	D/E S/S Col.			.2039175	.19875	.19875	.19875	.0700
8x8x16	Jamb & Joist	.2116125	.2116125	.2116125	.20625	.20625	.20625	.0700
8x8x8	Jamb & Joist	.10773	.10773	.10773	.1050	.1050	.1050	.0350
8x8x16	Bond Beam	.2039175	.2039175	.2039175	.19875	.19875	.19875	.0700
8x8x8	Lintel Plain	.1423575	.1423575	.1423575	.13875	.13875	.13875	.0350
8x8x8	Lintel S/S	.1423575	.1423575	.1423575	.13875	.13875	.13875	.0350
8x16x8	Lintel Plain & S/S			.207765	.2025	.2025	.2025	.0700
8x8x16	6" Wall Column			.2039175	.19875	.19875	.19875	.0700
8x8x16	B/N Pl. 2" Rad.	.2039175	.2039175	.2039175	.19875	.19875	.19875	.0700
8x8x8	B/N Pl. 2" Rad.	.1038825	.1038825	.1038825	.10125	.10125	.10125	.0350
8x8x16	B/N S/S 2" Rad.	.2039175	.2039175	.2039175	.19875	.19875	.19875	.0700
8x8x8	B/N S/S 2" Rad.	.1038825	.1038825	.1038825	.10125	.10125	.10125	.0350
8x8x16	B/N Pl. 8" Rad.	.207765	.207765	.207765	.2025	.2025	.2025	.0700
8x8x8	B/N Pl. 8" Rad.	.10773	.10773	.10773	.1050	.1050	.1050	.0350
8x4x16	Regulars			.12312	.1200	.1200	.1200	.0350
8x4x16	S/S Corner			.12312	.1200	.1200	.1200	.0350

(P. 38 BLANK)

SILVER CITY (cont.) and Beyond

Nominal Unit Size In Inches	Description	1950	1951	1952	1953	1954	1955	Delivery
8x4x16	Double End			.1346625	.13125	.13125	.13125	.0350
8x4x8	Corner			.0654075	.06375	.06375	.06375	.0265
12x8x16	Open End	.269325	.269325	.269325	.2625	.2625	.2625	.1050
12x8x16	Corner	.269325	.269325	.269325	.2625	.2625	.2625	.1050
12x8x16	Steel Sash	.269325	.269325	.269325	.2625	.2625	.2625	.1050
12x8x16	Double End	.284715	.284715	.284715	.2775	.2775	.2775	.1050
12x8x8	Corner	.1539	.1539	.1539	.1500	.1500	.1500	.0525
12x8x16	Spec. Corner	.284715	.284715	.284715	.2775	.2775	.2775	.1050
12x8x8	Lintel Plain	.16929	.16929	.16929	.1650	.1650	.1650	.0525
12x8x8	Lintel S/S	.16929	.16929	.16929	.1650	.1650	.1650	.0525
12x16x8	Lintel Pl. & S/S				.2775	.2775	.2775	.1050
2x8x16	S/Stone	.07695	.07695	.07695	.0750	.0750	.0750	.0265
8x4x10	Sills	.16929	.16929	.16929	.1650	.1650	.1650	.0265
2 1/4x4x8	Mod. Brick	.0176985	.0176985	.0176985	.01725	.01725	.01725	.0080
6x8x24	Soffit	.26163	.26163	.26163	.2550	.2550	.2550	.0965
8x8x24	Soffit	.300105	.300105	.300105	.2925	.2925	.2925	.1050
C-1	Column	.577125	.577125	.577125	.5625	.5625	.5625	.1400
C-2	Column			.577125	.5625	.5625	.5625	.1400
C-3	Column				.5625	.5625	.5625	.1400
C-4	Column				.5625	.5625	.5625	.1400

(P. 40 BLANK)

LORDSBURG

Nominal Unit Size In Inches	Description	1950	1951	1952	1953	1954	1955	Delivery
3x8x16	Partition	.0891	.0891	.0891	.0891	.0891	.0891	.0300
3x8x16	Solid			.1134	.1134	.1134	.1134	.0350
4x8x16	Partition	.1134	.1134	.1134	.1134	.1134	.1134	.0350
4x8x8	Partition	.06075	.06075	.06075	.06075	.06075	.06075	.0175
4x8x16	Solid	.1296	.1296	.1296	.1296	.1296	.1296	.0525
4x4x16	Solid					.0891	.0891	.0265
6x8x16	Partition	.1458	.1458	.1458	.1458	.1458	.1458	.0525
6x8x16	Partition S/S	.1458	.1458	.1458	.1458	.1458	.1458	.0525
6x8x14	Partition	.1458	.1458	.1458	.1458	.1458	.1458	.0525
6x8x8	Partition	.07695	.07695	.07695	.07695	.07695	.07695	.0265
6x8x16	Solid			.1863	.1863	.1863	.1863	.0700
6x8x8	Lintel Plain	.12555	.12555	.12555	.12555	.12555	.12555	.0265
6x8x8	Lintel S/S	.12555	.12555	.12555	.12555	.12555	.12555	.0265
8x8x16	Open Ends Corners	.1944	.1944	.1944	.1944	.1944	.1944	.0700
8x8x16	S/S Corner	.1944	.1944	.1944	.1944	.1944	.1944	.0700
8x8x16	Double End	.21465	.21465	.21465	.21465	.21465	.21465	.0700
8x8x8	Corner	.0972	.0972	.0972	.0972	.0972	.0972	.0350
8x8x16	D/E S/S & Col.			.21465	.21465	.21465	.21465	.0700
8x8x8	Open End					.0972	.0972	.0350
8x8x16	Jamb & Joist	.22275	.22275	.22275	.22275	.22275	.22275	.0700
8x8x8	Jamb & Joist	.1134	.1134	.1134	.1134	.1134	.1134	.0350
8x8x16	Bond Beam	.21465	.21465	.21465	.21465	.21465	.21465	.0700
8x8x8	Lintel Plain	.14985	.14985	.14985	.14985	.14985	.14985	.0350
8x8x8	Lintel S/S	.14985	.14985	.14985	.14985	.14985	.14985	.0350
8x16x8	Lintel Pl. & S/S	.		.2187	.2187	.2187	.2187	.0700
8x8x16	6" Wall Column			.21465	.21465	.21465	.21465	.0700
8x8x16	B/N Pl. 2" Rad.	.21465	.21465	.21465	.21465	.21465	.21465	.0700
8x8x8	B/N Pl. 2" Rad.	.10935	.10935	.10935	.10935	.10935	.10935	.0350
8x8x16	B/N S/S 2" Rad.	.21465	.21465	.21465	.21465	.21465	.21465	.0700
8x8x8	B/N S/S 2" Rad.	.10935	.10935	.10935	.10935	.10935	.10935	.0350
8x8x16	B/N Pl. 8" Rad.	.2187	.2187	.2187	.2187	.2187	.2187	.0700
8x8x8	B/N Pl. 8" Rad.	.1134	.1134	.1134	.1134	.1134	.1134	.0350

(P. 42 BLANK)

LORDSBURG (cont.)

Nominal Unit Size In Inches	Description	1950	1951	1952	1953	1954	1955	Delivery
8x8x4	Steel Sash					.06075	.06075	.0175
8x8x12	Steel Sash					.1620	.1620	.0525
8x12x8	Lintel Pl. or S/S					.1944	.1944	.0525
8x4x16	Regulars			.1296	.1296	.1296	.1296	.0350
8x4x16	S/S Corner			.1296	.1296	.1296	.1296	.0350
8x4x16	Double End			.14175	.14175	.14175	.14175	.0360
8x4x8	Corner			.06885	.06885	.06885	.06885	.0265
12x8x16	Open End	.2835	.2835	.2835	.2835	.2835	.2835	.1050
12x8x16	Corner	.2835	.2835	.2835	.2835	.2835	.2835	.1050
12x8x16	Steel Sash	.2835	.2835	.2835	.2835	.2835	.2835	.1050
12x8x16	Double End	.2997	.2997	.2997	.2997	.2997	.2997	.1050
12x8x8	Corner	.1620	.1620	.1620	.1620	.1620	.1620	.0525
12x8x16	Spec. Corner	.2997	.2997	.2997	.2997	.2997	.2997	.1050
12x8x16	Bond Beam					.2997	.2997	.1050
12x8x8	Lintel Plain	.1782	.1782	.1782	.1782	.1782	.1782	.0525
12x8x8	Lintel S/S	.1782	.1782	.1782	.1782	.1782	.1782	.0525
12x16x8	Lintel Pl. & S/S				.2997	.2997	.2997	.1050
2x8x16	S/Stone	.0810	.0810	.0810	.0810	.0810	.0810	.0265
8x4x10	Sill	.1782	.1782	.1782	.1782	.1782	.1782	.0265
8x4x14	Sill 12" Wall					.2754	.2754	.0350
2 1/4x4x8	Mod. Brick	.01863	.01863	.01863	.01863	.01863	.01863	.0080
8x8x16	Header O.E.					.21465	.21465	.0700
8x8x16	Header-Corn.					.21465	.21465	.0700
6x8x24	Soffit	.2754	.2754	.2754	.2754	.2754	.2754	.0965
8x8x24	Soffit	.3159	.3159	.3159	.3159	.3159	.3159	.1050
C-1	Column	.6075	.6075	.6075	.6075	.6075	.6075	.1400
C-2	Column			.6075	.6075	.6075	.6075	.1400
C-3	Column				.6075	.6075	.6075	.1400
C-4	Column				.6075	.6075	.6075	.1400

(P. 44 BLANK)

DEMING

Nominal Unit Size In Inches	Description	1950	1951	1952	1953	1954	1955	Delivery 1950&51	Delivery 1952-55
3x8x16	Partition	.0891	.0891	.08019	.08019	.08019	.08019	.0225	.01875
3x8x16	Solid			.10206	.10206	.10206	.10206	.0300	.0250
4x8x16	Partition	.1134	.1134	.10206	.10206	.10206	.10206	.0300	.0250
4x8x8	Partition	.06075	.06075	.054675	.054675	.054675	.054675	.0150	.0125
4x8x16	Solid	.1296	.1296	.11664	.11664	.11664	.11664	.0375	.0375
4x4x16	Solid					.08019	.08019	.01875	.01875
6x8x16	Partition	.1458	.1458	.13122	.13122	.13122	.13122	.0450	.0375
6x8x16	Partition S/S	.1458	.1458	.13122	.13122	.13122	.13122	.0450	.0375
6x8x14	Partition	.1458	.1458	.13122	.13122	.13122	.13122	.0450	.0375
6x8x8	Partition	.07695	.07695	.069255	.069255	.069255	.069255	.0225	.01875
6x8x16	Solid			.16767	.16767	.16767	.16767	.0600	.0500
6x8x8	Lintel Plain	.12555	.12555	.112995	.112995	.112995	.112995	.0225	.01875
6x8x8	Lintel S/S	.12555	.12555	.112995	.112995	.112995	.112995	.0225	.01875
8x8x16	Open End	.1944	.1944	.17496	.17496	.17496	.17496	.0600	.0500
8x8x16	Corner	.1944	.1944	.17496	.17496	.17496	.17496	.0600	.0500
8x8x16	S/S Corner	.1944	.1944	.17496	.17496	.17496	.17496	.0600	.0500
8x8x16	Double End	.21465	.21465	.193185	.193185	.193185	.193185	.0600	.0500
8x8x8	Corner	.0972	.0972	.08748	.08748	.08748	.08748	.0300	.0250
8x8x16	D/E S/S & Col.			.193185	.193185	.193185	.193185	.0600	.0500
8x8x8	Open End					.08748	.08758	.0300	.0250
8x8x16	Jamb & Joist	.22275	.22275	.200475	.200475	.200475	.200475	.0600	.0500
8x8x8	Jamb & Joist	.1134	.1134	.10206	.10206	.10206	.10206	.0300	.0250
8x8x16	Bond Beam	.21465	.21465	.193185	.193185	.193185	.193185	.0600	.0500
8x8x8	Lintel Plain	.14985	.14985	.134865	.134865	.134865	.134865	.0300	.0250
8x8x8	Lintel S/S	.14985	.14985	.134865	.134865	.134865	.134865	.0300	.0250
8x16x8	Lintel Pl. & S/S			.19683	.19683	.19683	.19683	.0600	.0500
8x8x16	6" Wall Column			.193185	.193185	.193185	.193185	.0600	.0500
8x8x16	B/N Pl. 2" Rad.	.21465	.21465	.193185	.193185	.193185	.193185	.0600	.0500
8x8x8	B/N Pl. 2" Rad.	.10935	.10935	.098415	.098415	.098415	.098415	.0300	.0250
8x8x16	B/N S/S 2" Rad.	.21465	.21465	.193185	.193185	.193185	.193185	.0600	.0500
8x8x8	B/N S/S 2" Rad.	.10935	.10935	.098415	.098415	.098415	.098415	.0300	.0250
8x8x16	B/N Pl. 8" Rad.	.2187	.2187	.19683	.19683	.19683	.19683	.0600	.0500
8x8x8	B/N Pl. 8" Rad.	.1134	.1134	.10206	.10206	.10206	.10206	.0300	.0250

P. 46 BLANK

DEMING (cont.)

Nominal Unit Size In Inches	Description	1950	1951	1952	1953	1954	1955	Delivery 1950&51	Delivery 1952-55
8x8x4	Steel Sash					.054675	.054675	.0150	.0125
8x8x12	Steel Sash					.1458	.1458	.0450	.0375
8x12x8	Lintel Pl. or S/S					.17496	.17496	.0450	.0375
8x4x16	Regular			.11664	.11664	.11664	.11664	.0300	.0250
8x4x16	S/S Corner			.11664	.11664	.11664	.11664	.0300	.0250
8x4x16	Double End			.127575	.127575	.127575	.127575	.0300	.0250
8x4x8	Corner			.61965	.61965	.61965	.61965	.0150	.0125
12x8x16	Open End	.2835	.2835	.25515	.25515	.25515	.25515	.0900	.0750
12x8x16	Corner	.2835	.2835	.25515	.25515	.25515	.25515	.0900	.0750
12x8x16	Steel Sash	.2835	.2835	.25515	.25515	.25515	.25515	.0900	.0750
12x8x16	Double End	.2997	.2997	.26973	.26973	.26973	.26973	.0900	.0750
12x8x8	Corner	.1620	.1620	.1458	.1458	.1458	.1458	.0450	.0375
12x8x16	Spec. Corner	.2997	.2997	.26973	.26973	.26973	.26973	.0900	.0750
12x8x16	Bond Beam					.26973	.26973	.0900	.0750
12x8x8	Lintel Plain	.1782	.1782	.16038	.16038	.16038	.16038	.0450	.0375
12x8x8	Lintel S/S	.1782	.1782	.16038	.16038	.16038	.16038	.0450	.0375
12x16x8	Lintel Pl. & S/S				.26973	.26973	.26973	.0900	.0750
2x8x16	S/Stone	.0810	.0810	.0729	.0729	.0729	.0729	.0200	.0150
8x4x10	Sill	.1782	.1782	.16038	.16038	.16038	.16038	.0250	.0200
8x4x14	Sill 12" Wall					.24786	.24786	.0300	.0250
2 1/4x4x8	Mod. Brick	.01863	.01863	.016767	.016767	.016767	.016767	.0060	.0050
8x8x16	Header O.E.					.193185	.193185	.0600	.0500
8x8x16	Header Corner					.193185	.193185	.0600	.0500
6x8x24	Soffit	.2754	.2754	.24786	.24786	.24786	.24786	.0675	.0575
8x8x24	Soffit	.3159	.3159	.28431	.28431	.28431	.28431	.0900	.0750
C-1	Column	.6075	.6075	.54675	.54675	.54675	.54675	.1200	.1000
C-2	Column			.54675	.54675	.54675	.54675	.1200	.1000
C-3	Column				.54675	.54675	.54675	.1200	.1000
C-4	Column				.54675	.54675	.54675	.1200	.1000

(P. 48 BLANK)

ALAMOGORDO

Nominal Unit Size In Inches	Description	1950	1951	1952	1952	1953	1954	1955	1955	Delivery
3x8x16	Partition	.0990	.0990	.0990	.0891	.0891	.0891	.0891	.0810	.0190
3x8x16	Solid			.1260	.1134	.1134	.1134	.1134	.1030	.0250
4x8x16	Partition	.1260	.1260	.1260	.1134	.1134	.1134	.1134	.1030	.0250
4x8x8	Partition	.0675	.0675	.0675	.06075	.06075	.06075	.06075	.0550	.0125
4x8x16	Solid	.1440	.1440	.1440	.1296	.1296	.1296	.1296	.1170	.0375
4x4x16	Solid						.0891	.0891	.0730	.0190
6x8x16	Partition	.1620	.1620	.1620	.1458	.1458	.1458	.1458	.1320	.0375
6x8x16	Partition S/S	.1620	.1620	.1620	.1458	.1458	.1458	.1458	.1320	.0375
6x8x14	Partition	.1620	.1620	.1620	.1458	.1458	.1458	.1458	.1320	.0375
6x8x8	Partition	.0855	.0855	.0855	.07695	.07695	.07695	.07695	.0700	.0190
6x8x16	Solid			.2070	.1863	.1863	.1863	.1863	.1680	.0500
6x8x8	Lintel Plain	.1395	.1395	.1395	.12555	.12555	.12555	.12555	.1140	.0190
6x8x8	Lintel S.S	.1395	.1395	.1395	.12555	.12555	.12555	.12555	.1140	.0190
8x8x16	Open End	.2160	.2160	.2160	.1944	.1944	.1944	.1944	.1750	.0500
8x8x16	Corner	.2160	.2160	.2160	.1944	.1944	.1944	.1944	.1750	.0500
8x8x16	S/S Corner	.2160	.2160	.2160	.1944	.1944	.1944	.1944	.1750	.0500
8x8x16	Double End	.2385	.2385	.2385	.21465	.21465	.21465	.21465	.1940	.0500
8x8x8	Corner	.1080	.1080	.1080	.0972	.0972	.0972	.0972	.0880	.0250
8x8x16	D/E S/S & Col.			.2385	.21465	.21465	.21465	.21465	.1940	.0500
8x8x8	Open End						.0972	.0972	.0880	.0250
8x8x16	Jamb & Joist	.2475	.2475	.2475	.22275	.22275	.22275	.22275	.2010	.0500
8x8x8	Jamb & Joist	.1260	.1260	.1260	.1134	.1134	.1134	.1134	.1030	.0250
8x8x16	Bond Beam	.2385	.2385	.2385	.21465	.21465	.21465	.21465	.1940	.0500
8x8x8	Lintel Plain	.1665	.1665	.1665	.14985	.14985	.14985	.14985	.1350	.0250
8x8x8	Lintel S/S	.1665	.1665	.1665	.14985	.14985	.14985	.14985	.1350	.0250
8x16x8	Lintel Pl. & S/S			.2430	.2187	.2187	.2187	.2187	.1970	.0500
8x8x16	6" Wall Column			.2385	.21465	.21465	.21465	.21465	.1940	.0500
8x8x16	B/N Pl. 2" Rad.	.2385	.2385	.2385	.21465	.21465	.21465	.21465	.1940	.0500
8x8x8	B/N Pl. 2" Rad.	.1215	.1215	.1215	.10935	.10935	.10935	.10935	.0990	.0250
8x8x16	B/N S/S 2" Rad.	.2385	.2385	.2385	.21465	.21465	.21465	.21465	.1940	.0500
8x8x8	B/N S/S 2" Rad.	.1215	.1215	.1215	.10935	.10935	.10935	.10935	.0990	.0250
8x8x16	B/N Pl. 8" Rad.	.2430	.2430	.2430	.2187	.2187	.2187	.2187	.1970	.0500
8x8x8	B/N Pl. 8" Rad.	.1260	.1260	.1260	.1134	.1134	.1134	.1134	.1030	.0250

P.50 Blank

ALAMOGORDO (cont.)

Nominal Unit Size In Inches	Description	1950	1951	1952	1952	1953	1954	1955	1955	Delivery
8x8x4	Steel Sash						.06075	.06075	.0550	.0125
8x8x12	Steel Sash						.1620	.1620	.1460	.0500
8x12x8	Lintel Pl. or S/S						.1944	.1944	.1750	.0500
8x4x16	Regular			.1440	.1296	.1296	.1296	.1296	.1170	.0250
8x4x16	S/S Corner			.1440	.1296	.1296	.1296	.1296	.1170	.0250
8x4x16	Double End			.1575	.14175	.14175	.14175	.14175	.1280	.0250
8x4x8	Corner			.0765	.06885	.06885	.06885	.06885	.0620	.0190
12x8x16	Open End	.3150	.3150	.3150	.2835	.2835	.2835	.2835	.2560	.0750
12x8x16	Corner	.3150	.3150	.3150	.2835	.2835	.2835	.2835	.2560	.0750
12x8x16	Steel Sash	.3150	.3150	.3150	.2835	.2835	.2835	.2835	.2560	.0750
12x8x16	Double End	.3330	.3330	.3330	.2997	.2997	.2997	.2997	.2700	.0750
12x8x8	Corner	.1800	.1800	.1800	.1620	.1620	.1620	.1620	.1460	.0375
12x8x16	Spec. Corner	.3330	.3330	.3330	.2997	.2997	.2997	.2997	.2700	.0750
12x8x16	Bond Beam						.2997	.2997	.2700	.0750
12x8x8	Lintel Plain	.1980	.1980	.1980	.1782	.1782	.1782	.1782	.1610	.0375
12x16x8	Lintel Pl. & S/S					.2997	.2997	.2997	.2700	.0750
2x8x16	S/Stone	.0900	.0900	.0900	.0810	.0810	.0810	.0810	.0730	.0190
8x4x10	Sill	.1980	.1980	.1980	.1782	.1782	.1782	.1782	.1610	.0250
8x4x14	Sill						.2754	.2754	.2480	.0500
2 1/4x4x8	Mod. Brick	.0207	.0207	.0207	.01863	.01863	.01863	.01863	.0180	.0050
8x8x16	Header O.E.						.21465	.21465	.1940	.0500
8x8x16	Header Corner						.21465	.21465	.1940	.0500
6x8x24	Soffit	.3060	.3060	.3060	.2754	.2754	.2754	.2754	.2450	.0565
8x8x24	Soffit	.3510	.3510	.3510	.3159	.3159	.3159	.3159	.2840	.0750
C-1	Column	.6750	.6750	.6750	.6075	.6075	.6075	.6075	.5470	.1000
C-2	Column			.6750	.6075	.6075	.6075	.6075	.5470	.1000
C-3	Column					.6075	.6075	.6075	.5470	.1000
C-4	Column					.6075	.6075	.6075	.5470	.1000

P.51
BLANK

LAS CRUCES

Nominal Unit Size In Inches	Description	1950	1951	1952	1952	1953	1954	1955	Delivery
3x8x16	Partition	.0990	.0990	.0990	.0780	.0780	.0780	.0780	.0200
3x8x16	Solid			.1260	.0990	.0990	.0990	.0990	.0200
4x8x16	Partition	.1260	.1260	.1260	.1000	.1000	.1000	.1000	.0200
4x8x8	Partition	.0675	.0675	.0675	.0540	.0540	.0540	.0540	.0150
4x8x16	Solid	.1440	.1440	.1440	.1140	.1140	.1140.	.1140	.0300
6x8x16	Partition	.1620	.1620	.1620	.1280	.1280	.1280	.1280	.0200
6x8x16	Partition S/S	.1620	.1620	.1620	.1280	.1280	.1280	.1280	.0200
6x8x14	Partition	.1620	.1620	.1620	.1280	.1280	.1280	.1280	.0200
6x8x8	Partition	.0855	.0855	.0855	.0680	.0680	.0680	.0680	.0150
6x8x16	Solid			.2070	.1630	.1630	.1630	.1630	.0300
6x8x8	Lintel Plain	.1395	.1395	.1395	.1100	.1100	.1100	.1100	.0150
6x8x8	Lintel S/S	.1395	.1395	.1395	.1100	.1100	.1100	.1100	.0150
8x8x16	Open End	.2160	.2160	.2160	.1700	.1700	.1700	.1700	.0300
8x8x16	Corner	.2160	.2160	.2160	.1700	.1700	.1700	.1700	.0300
8x8x16	S/S Corner	.2160	.2160	.2160	.1700	.1700	.1700	.1700	.0300
8x8x16	Double End	.2385	.2385	.2385	.1880	.1880	.1880	.1880	.0300
8x8x8	Corner	.1080	.1080	.1080	.0850	.0850	.0850	.0850	.0150
8x8x16	D/E S/S & Col.			.2385	.1880	.1880	.1880	.1880	.0300
8x8x16	Jamb & Joist	.2475	.2475	.2475	.1950	.1950	.1950	.1950	.0300
8x8x8	Jamb & Joist	.1260	.1260	.1260	.1000	.1000	.1000	.1000	.0150
8x8x16	Bond Beam	.2385	.2385	.2385	.1880	.1880	.1880	.1880	.0300
8x8x8	Lintel Plain	.1665	.1665	.1665	.1320	.1320	.1320	.1320	.0150
8x8x8	Lintel S/S	.1665	.1665	.1665	.1320	.1320	.1320	.1320	.0150
8x16x8	Lintel Pl. & S/S	.		.2430	.1910	.1910	.1910	.1910	.0300
8x8x16	6" Wall Column			.2385	.1880	.1880	.1880	.1880	.0300
8x8x16	B/N Pl. 2" Rad.	.2385	.2385	.2385	.1880	.1880	.1880	.1880	.0300
8x8x8	B/N Pl. 2" Rad.	.1215	.1215	.1215	.0960	.0960	.0960	.0960	.0150
8x8x16	B/N S/S 2" Rad.	.2385	.2385	.2385	.1880	.1880	.1880	.1880	.0300
8x8x8	B/N S/S 2" Rad.	.1215	.1215	.1215	.0960	.0960	.0960	.0960	.0150
8x8x16	B/N Pl. 8" Rad.	.2430	.2430	.2430	.1920	.1920	.1920	.1920	.0300
8x8x8	B/N Pl. 8" Rad.	.1260	.1260	.1260	.1000	.1000	.1000	.1000	.0150
8x4x16	Regular			.1440	.1130	.1130	.1130	.1130	.0200
8x4x16	S/S Corner			.1440	.1130	.1130	.1130	.1130	.0200

P. 54 BLANK

LAS CRUCES (cont.)

Nominal Unit Size In Inches	Description	1950	1951	1952	1952	1953	1954	1955	Delivery
8x4x16	Double End			.1575	.1240	.1240	.1240	.1240	.0200
8x4x8	Corner			.0765	.0600	.0600	.0600	.0600	.0150
12x8x16	Open End	.3150	.3150	.3150	.2480	.2480	.2480	.2480	.0400
12x8x16	Corner	.3150	.3150	.3150	.2480	.2480	.2480	.2480	.0400
12x8x16	Steel Sash	.3150	.3150	.3150	.2480	.2480	.2480	.2480	.0400
12x8x16	Double End	.3330	.3330	.3330	.2630	.2630	.2630	.2630	.0400
12x8x8	Corner	.1800	.1800	.1800	.1420	.1420	.1420	.1420	.0300
12x8x16	Spec. Corner	.3330	.3330	.3330	.2630	.2630	.2630	.2630	.0400
12x8x8	Lintel Plain	.1980	.1980	.1980	.1560	.1560	.1560	.1560	.0300
12x8x8	Lintel S/S	.1980	.1980	.1980	.1560	.1560	.1560	.1560	.0300
12x16x8	Lintel Pl. & S/S				.2630	.2630	.2630	.2630	.0400
2x8x16	S/Stone	.0900	.0900	.0900	.0710	.0710	.0710	.0710	.0200
8x4x10	Sill	.1980	.1980	.1980	.1560	.1560	.1560	.1560	.0150
2 1/4x4x8	Mod. Brick	.0207	.0207	.0207	.0210	.0210	.0210	.0210	.0030
6x8x24	Soffit	.3060	.3060	.3060	.2410	.2410	.2410	.2410	.0400
8x8x24	Soffit	.3510	.3510	.3510	.2760	.2760	.2760	.2760	.0400
C-1	Column	.6750	.6750	.6750	.5310	.5310	.5310	.5310	.0600
C-2	Column			.6750	.5310	.5310	.5310	.5310	.0600
C-3	Column				.5310	.5310	.5310	.5310	.0600
C-4	Column				.5310	.5310	.5310	.5310	.0600

(P. 58 BLANK)

56] Defendant's Additional Answers To Plaintiff's Interrogatories Nos. 26 and 35

(Plaintiff's Exhibit 20.)

Further in answer to Interrogatories Nos. 26 and 35, defendant attaches hereto six Tables or Schedules marked for identification, respectively, Nos. A, B, C, D, E and F.

Burges, Scott, Rasberry & Hulse,
Rodey, Dickason, Sloan, Mims & Akin
By J. F. Hulse
Attorneys for Defendant

The State Of Texas County Of El Paso

Before Me, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared Milton W. Stovall, who having been by me first duly sworn says that he is Vice-President of The Atlas Building Products Co., and has knowledge of the facts herein stated; that the answers hereinabove set out are true and correct.

Milton W. Stovall

Subscribed And Sworn To by the said Milton W. Stovall before me, this 3rd day of August, 1956, to certify which witness my hand and seal of office.

(Seal)

Gladys Horton
Notary Public in and for
El Paso County, Texas

My commission expires June 1, 1957

Filed Aug. 7, 1956.

LAS CRUCES

(P. 60 BLANK)

Description		1947	1948	1949	Del. Chg.
4x8x16	Partition	.1125	.1125	.1125	.0200
8x8x16	Regular	.1980	.1980	.1980	.0300
8x8x8	Halves	.0990	.0990	.0990	.0150
6x8x16	Partition	.1440	.1440	.1440	.0200
8x8x8	B/N Sash		.1260	.1260	.0150
8x8x16	B/N S/Sash		.2520	.2520	.0300
8x8x16	Sash		.1980	.1980	.0300
8x8x8	Lintel		.1800	.1800(.1530)	.0150
4x8x8	Half		.0630	.0630	.0100
8x4x10	Sill		.1800	.1800	.0150
8x8x16	Jamb		.2250	.2250	.0300
2x8x16	Solid		.1200	.0720	.0200
4x8x16	Solid		.1305	.1305	.0150
12x8x16	Open End		.2880	.2880	.0400
12x8x16	Corner		.2880	.2880	.0400
8x8x16	Double End		.2250	.2250	.0300
12x8x8	Lintel			.1800	.0300
12x8x8	Half		.1440	.1620	.0300
12x8x16	Double End		.3150	.3150	.0400
12x8x16	Spec. Corner		.3150	.3150	.0400
8x8x8	Jamb			.1125	.0150
6x8x8	Half			.0810	.0100
6x8x14	Partition			.1440	.0200
6x8x8	Lintel			.1260	.0100
3x8x16	Partition			.0900	.0200

EL PASO

(P. 62 BLANK)

Description		1947	1948	1949	Del. Chg.
8x8x16	Regular	.1980	.1980	.1980	.0150
8x8x8	Halves	.0990	.0990	.0990	.0075
4x8x16	Partition	.1125	.1125	.1125	.0100
8x8x16	Sash	.1980	.1980	.1980	.0150
4x8x16	Solid	.1305	.1305	.1305	.0150
6x8x16	Partition	.1440	.1440	.1440	.0100
12x8x16	Open End	.2880	.2880	.2880	.0200
12x8x16	Corner	.2880	.2880	.2880	.0200
2x8x16	Solid	.1200	.1200	.0720	.0100
8x8x16	B/N Sash	.2520	.2520	.2520(.2160)	.0150
8x8x8	B/N Half	.1260	.1260	.1260(.1080)	.0075
8x8x16	Double End	.2250	.2250	.2250	.0150
8x8x8	Lintel	.1800	.1800	.1800(.1530)	.0075
12x8x8	Half	.1440	.1440	.1620	.0100
12x8x16	Double End		.3150	.3150	.0200
12x8x16	Spec. Corner		.3150	.3150	.0250
2x4x8	Brick		.0135	.0135	
4x8x8	Half		.063	.063	.005
8x8x16	Jamb			.2520(2250)	.0150
8x8x8	Half Jamb			.1260(.1125)	.0075
6x8x8	Half			.0810	.0075
8x4x10	Sill			.1800	.0075
6x8x14	Partition			.1440	.0100
6x8x8	Lintel			.1260	.0075
3x8x16	Partition			.0900	.0100
12x8x8	Lintel			.1800	.0150

(P.64 BLANK)

DEMING

Description		1947	1948	1949	Del. Chg.
8x8x16	Regular	.1980	.1782	.1782	.0600
8x8x8	Halves	.0990	.0891	.0891	.0300
8x8x16	Sash		.1782	.1782	.0600
8x8x8	Lintel		.1620	.1620	.0300
8x8x16	Double End		.2025	.2025	.0600
6x8x16	Partition		.1296	.1296	.0450
4x8x16	Partition		.10125	.10125	.0300
12x8x16	Open End		.2592	.2592	.0900
2x8x16	Solid		.1080	.0648	.0150
8x8x16	Bull Nose		.2268	.2268	.0600
8x8x8	Half Bull Nose		.1134	.1134	.0300
4x8x16	Solid		.11745	.11745	.0450
12x8x16	Corner		.2592	.2592	.0900
12x8x8	Half		.1296	.1458	.0450
12x8x16	Double End		.2835	.2835	.0900
12x8x16	Spec. Corner		.2835	.2835	.0900
4x8x8	Half		.0567	.0567	.0150
8x8x16	Jamb			.2025	.0600
8x8x8	Half Jamb			.10125	.0300
6x8x8	Half			.0729	.0225
8x4x10	Sill			.1620	.0200
6x8x14	Partition			.1296	.0450
6x8x8	Lintel			.1134	.0225
3x8x16	Partition			.0810	.0200
12x8x8	Lintel			.1620	.0450

ALAMOGORDO

(P. 66 BLANK)

Description		1947	1948	1949	Del. Chg.
8x8x16	Regular		.1980	.1980	.0500
8x8x16	S/Sash		.1980	.1980	.0500
4x8x16	Partition		.1125	.1125	.0250
6x8x16	Partition		.1440	.1440	.0375
12x8x16	Open End		.2880	.2880	.0750
2x8x16	Solid		.1200	.0720	.0150
8x8x16	Bull Nose		.2520	.2520	.0500
8x8x8	Half Bull Nose		.1260	.1260	.0250
8x8x8	Lintel		.1800	.1800	.0250
8x8x8	Halves		.0990	.0990	.0250
4x8x16	Solid		.1305	.1305	.0375
12x8x16	Corner		.2880	.2880	.0750
8x8x16	Double End		.2250	.2250	.0500
12x8x8	Halves		.1440	.1620	.0375
12x8x16	Double End		.3150	.3150	.0750
12x8x16	Spec. Corner		.3150	.3150	.0750
4x8x8	Half		.063	.063	.0150
8x8x16	Jamb			.2250	.0500
8x8x8	Half Jamb			.1125	.0250
6x8x8	Half			.0810	.0200
8x4x10	Sill			.1800	.0250
6x8x14	Partition			.1440	.0375
6x8x8	Lintel			.1260	.0200
3x8x16	Partition			.0900	.0200
12x8x8	Lintel			.1800	.0375

SILVER CITY

(P.68 BLANK)

Description		1947	1948	1949	Del. Chg.
8x8x8	Halves	.0891	.0891	.0891	Rail
8x8x16	S/Sash	.1782	.1782	.1782	Ship-
8x8x16	Regular	.1782	.1782	.1782	ments
4x8x16	Partition	.10025	.10025	.10025	
8x8x16	B/N Sash	.2268	.2268	.2268	
8x8x8	B/N Halves	.1134	.1134	.1134	
4x8x16	Solid		.12745	.12745	
6x8x16	Partition		.1296	.1296	
12x8x16	Open End		.2592	.2592	
12x8x16	Corner		.2592	.2592	
2x8x16	Solid		.1200	.0648	
8x8x16	Double End		.2025	.2025	
8x8x8	Lintel		.1800	.1530	
6x8x8	Lintel			.1134	
12x8x8	Half		.1296	.1458	
12x8x16	Double End		.2835	.2835	
12x8x16	Spec. Corner		.2835	.2835	
4x8x8	Half		.0567	.0567	
8x8x16	Jamb			.2025	
8x8x8	Jamb			.10125	
6x8x8	Half			.0729	
8x4x10	Sill			.1620	
6x8x14	Partition			.1296	
3x8x16	Partition			.0810	
12x8x8	Lintel			.1620	

LORDSBURG

(P70 BLANK)

Description		1947	1948	1949	Del. Chg.
8x8x16	Regular	.1980	.1782	.1782	Picked
8x8x8	Halves	.0990	.0891	.0891	Up
4x8x16	Partition		.10125	.10125	By
8x8x16	Bull Nose		.2268	.2268	Customer
8x8x16	S/Sash		.1782	.1782	
6x8x16	Partition		.1296	.1296	
8x8x8	Half Bull Nose		.1134	.1134	
4x8x16	Solid		.12745	.12745	
6x8x8	Lintel			.1134	
8x8x8	Lintel		.1377	.1377	
12x8x16	Open End		.2592	.2592	
12x8x16	Corner		.2592	.2592	
2x8x16	Solid		.1200	.0648	
8x8x16	Double End		.2025	.2025	
12x8x8	Half		.1296	.1458	
12x8x16	Double End		.2835	.2835	
12x8x16	Spec. Corner		.2835	.2835	
4x8x8	Half		.0567	.0567	
8x8x16	Jamb			.2025	
8x8x8	Half Jamb			.10125	
6x8x8	Half			.0729	
8x4x10	Sill			.1620	
6x8x14	Partition			.1296	
3x8x16	Partition			.0810	
12x8x8	Lintel			.1620	

Pretrial Conference.

Mr. Eastham: The next point we would like to bring up is on the question of pleadings. I know in court one day we amended our answer to bring up the meeting of prices in good faith. I have forgotten the language, which language we used in that. And I thought just to keep the record clear I could dictate a fifth defense into the record now which would make it clear that has been done. The Court, as you will recall, ruled we could amend our answer in that respect. We will give you a copy of this so that you will have it for your records too.

Mr. Blythe: All right.

Mr. Eastham: This will be an amendment to the answer heretofore filed in the case by adding a fifth defense, reading as follows:

"That if the defendant has discriminated in prices, which discrimination is specifically denied, such discrimination was made in good faith to meet an equally low price of a competitor."

As far as I know, that is our only amendment to the pleadings.

The Court: That wasn't in your original answer?

Mr. Eastham: That is correct.

The Court: And I gave you permission to file that amendment?

Mr. Eastham: That is correct, and as I remember we read one into the record at that time.

The Court: Just so the record will be straight, you should file a separate amendment in the record. Have it typed and filed.

Mr. Eastham: Fine.

The Court: Because when I go to the file to prepare

instructions I might overlook it.

Mr. Eastham: Would you like a full answer with this - with this addition to it?

The Court: I think it would be better.

Mr. Eastham: All right. We will do that.

Mr. Blythe: If Your Honor please, we intend to immediately file a motion to strike that defense, and for a bill of particulars, and we would like to have an early setting.

The Court: File a motion to strike the amendment?

Mr. Blythe: That defense.

The Court: You may do so.

Mr. Blythe: And for a bill of particulars on what prices they met and what competitors. We would like to have an early setting on that motion. I realize it is unusual to ask for a setting on a motion not yet filed.

Mr. Eastham: May I say just one thing on that? We certainly couldn't do any good giving a bill of particulars until we know what prices they are saying we have discriminated with. That is putting the cart completely before the horse. We don't know what proof they will come up with as to any alleged discriminations, and until we know that, we certainly can't spell out our defense.

Mr. Blythe: I think they have a pretty good idea after pulling all those invoices.

Mr. Eastham: It would be impossible -- I think it would be a waste of the Court's time to have an argument on it. But if the Court wishes, we will certainly appear. But that would be what we would have to say, and I don't see how we could possibly do anything else.

The Court: Permission to make this amendment was granted some time ago, and I think it was indicated at that time what the amendment would be.

Mr. Eastham: I think we read it into the record.

Mr. Blythe: I am sure we didn't. I paid close attention to that. There was nothing.

The Court: Anyway, you had a general idea, I'm sure. At least I did. I think, gentlemen, we have had enough motions. The motion to strike, you may file if you desire, and also the motion for bill of particulars. It comes too late. We have got to get this case ready for trial.

Mr. Blythe: Your Honor, we haven't had anything to attack up until now.

The Court: Yes, you could. At that time you had the same knowledge you have today.

Mr. Blythe: I assumed they had abandoned that idea. They seemed to think they had it covered and said if they didn't have it covered they sure wanted to get it in there. I assumed by their activity - their inactivity - they had decided their pleadings were sufficient. I believe the preparation of our case has been prejudiced, because we would certainly have been asking a lot of questions on the taking of depositions and in these interrogatories which we haven't asked. We were hoping, frankly, that they thought that they had it adequately covered.

The Court: Well, the permission was given to file it, and I see no reason why you think they would abandon it.

* * * * *

Mr. Eastham: Well, we are planning on asking additional information by interrogatories of information which has developed since our initial interrogatories and depositions, and under the circumstances if they are afraid to admit that, we would like to list that as one of the items that we will ask of sales known to him where we have undersold him.

The Court: I think in the light of the testimony that has been given, if he knows of other sales you might give

him that information.

Mr. Blythe: Do we have similarly to file additional interrogatories, Your Honor?

The Court: I haven't granted anybody leave to file interrogatories yet. But if I grant them leave, I will certainly grant you leave. I don't know as they need any, either one of you. You can keep filing interrogatories, I presume, under the statute.

Mr. Blythe: I thought under the Court's ruling on this new defense of theirs I couldn't go into that matter by interrogatory or motions.

The Court: I didn't say anything about interrogatories. I said motion to strike and bill of particulars. I like to have you gentlemen present and arguing in the courtroom, but I have other work to do besides this case.

* * * * *

64] Further Interrogatories By Plaintiff To Defendant.

The plaintiff requests that the defendant corporation, by an officer or agent thereof, answer under oath, in accordance with Rule 33 of the Rules of Civil Procedure, the following further interrogatories:

1. Does defendant contend that any prices, exclusive of transportation charges, exacted by it for cinder concrete building blocks from dealers or contractors in Grant, Luna and Hidalgo counties, New Mexico, since January 1, 1948, were set lower than prices exacted elsewhere by defendant for its products of like grade and quality in order to meet the equally low price of a competitor?

2. If the answer to Interrogatory No. 1, above, is in the affirmative, give the following information:

(a) Each price of defendant so established;

(b) The date each such price of defendant was established and the closing date, if any, of the period for which it was effective;

(c) The name and address of the person, firm or corporation to which each such price was made by defendant;

(d) Whether each such price of defendant was arrived at by granting a discount, rebate or any service or other thing of value, and, if so, the character, amount and value thereof;

65] (e) The name and address of each competitor whose equally low price was so met by defendant and of the person, firm or corporation to whom or to which each such price was offered by a competitor;

(f) The amount of each such price of a competitor which was met by defendant, the date each such price first was offered, the closing date, if any, of the period during which it was offered, and the date on which the defendant, through its officers, employees and agents, first learned of each such price;

(g) If such price of a competitor was made for particular job or project, give the name and location of same;

(h) Whether the person, firm or corporation to whom or to which defendant made each such price was, prior to the granting of such price, the customer of the defendant, and, if so, the date on which he or it became defendant's customer;

(i) Whether each such competitor whose equally low price was met by defendant was, to the knowledge of defendant's officers, employees and agents, then and there engaged in selling such blocks in more than one state, and, if so, the prices exacted elsewhere for its blocks by such competitor;

(j) Whether defendant, its officers, servants and employees made any effort to determine whether such competitor's price was lawful, and, if so, what efforts were so made and by whom, the information secured as a result of such efforts, and the conclusions reached regarding the lawfulness of such competitor's price; and

(k) Whether each such competitor's cinder concrete building blocks were then and there equal in quality to defendant's blocks, and, if not, the extent to which defendant contends such competitor's blocks were inferior or susperior in quality to defendant's.

66] 3. Does defendant rely on the defense of meeting the equally low price of a competitor in any situations not covered by Interrogatories Nos. 1 and 2 above? If so, give the same information regarding each such situation required by Interrogatory No. 2.

4. Give the name and address of each witness by whom the defendant expects to prove the defense of meeting the equally low price of a competitor, the facts it expects to prove by each such witness, and the names and addresses of any other persons having or purporting to have knowledge of facts concerning said defense in this case.

5. Give the names and addresses of all witnesses by whom defendant proposes to prove the quality of Atlas blocks as compared to Elgin blocks, and the facts each witness knows or purports to know concerning same.

* * * * *

67] 9. Please list all instances where Elgin block has been sold to a job at a lesser price than the bid made by defendant or defendant's dealers, and in each instance list the price at which Elgin block was sold and the price at which Atlas block were bid.

Dee C. Blythe
Hubert O. Robertson
Attorneys For Plaintiff

Filed Sept. 14, 1956.

The Elgin Corporation vs. The Atlas Building Products Co.

68] Defendant's Answers To Further Interrogatories Propounded By Plaintiff.

1-4. Any prices in Grant, Luna or Hidalgo Counties, New Mexico, since January 1, 1948, which were set lower by the defendant than prices enacted elsewhere by defendant for its products of like grade and quality were done so in order to meet the equally low prices of its competitors, the Elgin Corporation of Silver City, and the Deming Concrete Products of Deming, New Mexico. Witnesses on these questions will be Milton W. Stovall, Ervin H. Hahn, N. N. McCrary, Harold Bishop, W. B. Russell, W. E. Johnson, J. V. Glenn, Robert Elgin, John Gray, and Thomas W. Foy, with the prices quoted and obtained by each of these witnesses being the facts proved.

5. W. B. Russell, Silver City, New Mexico; W. E. Johnson, Silver City, New Mexico; J. V. Glenn, Silver City, New Mexico; R. R. Ellerson, Silver City, New Mexico; Carl Hanse, Silver City, New Mexico; Joe Hansen, El Paso, Texas; A. B. Cook, El Paso, Texas.

* * * * *

9. The Defendant knows of only three (3) jobs where Elgin block has been sold to a job at a lesser price than the bid made by Defendant. These jobs are the Cobre School job and two jobs presently in construction at New Mexico Western. In each case, Elgin block were sold for twenty-five cents and the Atlas block was bid at twenty-six cents.

The Defendant does not know what the dealers who handle its block have bid on any jobs on which Elgin block was sold, and the Defendant is, therefore, unable to answer the balance of this question.

Milton W. Stovall, Vice President,
The Atlas Building Products Company

69] Subscribed and sworn to before me by the said Milton W. Stovall this 1st day of October, 1956.

(Seal)

Lauro Carrillo Jr
Notary Public in and for
El Paso County, Texas

My commission expires: June 1, 1957

The Elgin Corporation vs. The Atlas Building Products Co.

Burges, Scott, Rasberry & Hulse and
Rodey, Dickason, Sloan, Mims & Akin
By: John P. Eastham
Attorneys for Defendant

Filed Oct. 8, 1956.

70] Motion To Strike.

Comes now the plaintiff and moves the Court to strike defendant's defense of meeting the equally low price of a competitor, and to strike defendant's answers to plaintiff's Further Interrogatories Nos. 1, 2, 3, 4, 5, and 9, and as grounds for its motion says:

1. That in the course of oral argument at a hearing on a motion soon after this action was commenced, defendant requested and was granted leave to amend its answer to raise the defense of meeting the equally low price of a competitor; that no formal order to this effect ever was entered.

2. That at the pre-trial conference on September 4, 1956, defendant again requested and was granted leave to so amend its answer, over plaintiff's objection, but still has not done so.

3. That on September 13, 1956, plaintiff served Further Interrogatories on defendant, Nos. 1, 2,3, 4, 5 and 9 of which were designed to ascertain the purported facts supporting said defense; that answers to said Further Interrrogatories were received by counsel for plaintiff late in the afternoon of October 2,1956; that under Rules 5 (a), 6 (a), 6 (e) and 33 of the Rules of Civil Procedure said answers were not timely served; that this case is set for trial on the merits commencing October 8, 1956; and that plaintiff's preparations for trial have been prejudiced by defendant's failure to amend its answer within a reasonable time after the granting of leave to do so and by its failure to serve timely and full answers to said Further Interrogatories.

4. That defendant's answers to said Further Interroga-
71] tories are evasive and inadequate to support said defense of meeting the equally low price of a competitor;

that in order for plaintiff properly to prepare its case for trial it is necessary for it to know the information requested in said interrogatories; that if the defendant had no more information regarding its competitor's prices than it has revealed in its answers to said interrogatories said defense of meeting the equally low price of a competitor is insufficient as a matter of law.

Wherefore, plaintiff prays that said defense of meeting the equally low price of a competitor, and defendant's answers to said Further Interrogatories, be ordered stricken and that defendant be precluded from offering any evidence concerning said defense at the trial on the merits.

Dated this 2nd day of October, 1956.

Dee C. Blythe
Hubert O. Robertson
Attorneys For Plaintiff

Filed Oct. 4, 1956.

72] Amended Motion To Strike.

Comes now the plaintiff and moves the Court to strike the following portions of defendant's pleadings filed herein:

(a) All except the first sentence of Paragraph (4) of the Second Defense of the Amended Answer of Defendant;

(b) All of Paragraph (5) of the Second Defense of said Amended Answer except the first clause thereof;

(c) The Fifth Defense of said Amended Answer; and

(d) Defendant's answers to plaintiff's Further Interrogatories Nos. 1, 2, 3, 4, 5, and 9;

and as grounds for its motion says:

1. That in the course of oral argument at a hearing on a motion on other matters soon after this action was commenced, defendant requested and was granted leave to amend its answer to raise the defense of meeting the equally low

price of a competitor; that no formal order to this effect ever was entered.

2. That at the pre-trial conference on September 4, 1956, defendant again requested and was granted leave to amend its answer, over plaintiff's objection, but said Amended Answer was not filed until October 4, 1956, and was not received by counsel for plaintiff until October 5, 1956.

3. That on September 13, 1956, plaintiff served Further Interrogatories on defendant, Nos. 1, 2, 3, 4, 5, and 9 of which were designed to ascertain the purported facts
73] supporting said defense; that answers to said Further Interrogatories were received by counsel for plaintiff late in the afternoon of October 2, 1956; that this case is set for trial on the merits commencing October 8, 1956; and that plaintiff's preparations for trial have been prejudiced by defendant's failure to amend its answer within a reasonable time after the granting of leave to do so and by its failure to serve prompt and full answers to said Further Interrogatories.

4. That defendant's answers to said Further Interrogatories are evasive and inadequate to support said defense of meeting the equally low price of a competitor; that in order for plaintiff properly to prepare its case for trial it is necessary for it to know the information requested in said interrogatories; and that if the defendant had no more information regarding its competitors' prices than it has revealed in its answers to said interrogatories said defense of meeting the equally low price of a competitor is insufficient as a matter of law.

5. That said portions of Paragraphs (4) and (5) of the Second Defense of said Amended Answer are argumentative, evasive, redundant, and inconsistent with general denials contained in the same paragrapns, and they attempt to raise purported issues of justification which are not legal defenses to this action.

6. That the quality of plaintiff's cinder concrete building blocks, as attempted to be raised in said Paragraph (4) of the Second Defense, is not an issue in this case.

7. That the intent of the defendant in discriminating in price is not a defense to an action under §2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 USCA §13(a), and is an element of the case only insofar as it may have a bearing on the possible effect of such acts.

74] Dated October 8, 1956.

Hubert O. Robertson
Dee C. Blythe
Attorneys For Plaintiff

Filed Oct. 6, 1956.

75] Order Denying Motion To Strike.

This matter having this day regularly come before me for hearing on plaintiff's Amended Motion to Strike, and the Court having heard the arguments of counsel and being sufficiently advised in the premises;

It Is Ordered that said motion be and it hereby is denied.

Dated October 8, 1956.

Carl A. Hatch
District Judge

Filed Oct. 25, 1956, nunc pro tunc as of Oct. 8, 1956.

76] Plaintiff's Requested Instruction No. 5.

A seller may rebut a prima facie case of price discrimination "by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." This defense is limited to specific situations in which a customer of the seller has been offered a lower price, or the furnishing of services or facilities, by a competitor, and in such situations the seller may only meet,

and cannot cut below, the competitor's lower price, or match his offer of services or facilities. Also, the seller is justified in meeting his competitor's offer only if the competitor's price is lawful, for if his competitor's price is unlawful the seller should take legal action against the competitor rather than to take the law into his own hands. Furthermore, the seller may meet his competitor's offer only to hold a customer the seller already has, and not to gain new customers.

A competitor's lower price, or furnishing of services or facilities, to certain customers does not justify geographic price discrimination covering a segment of the market. If you find from the evidence that the defendant reduced its mill net prices in any area in which it competed with plaintiff, instead of meeting competitive offers to specific customers, you should return a verdict in favor of the plaintiff.

It is admitted in this case that the plaintiff is not engaged in interstate commerce and hence is not subject to the Federal statutes against price discrimination. However, the defendant may meet, in good faith, the plaintiff's prices, services or facilities, the same as those of any other competitor.

No evidence of unlawful sales CAH*
*Handwritten notation

77] If you should find from the evidence that the Elgin cut its prices in certain instances Atlas would not thereby be justified in making an area-wide price cut.

You are further instructed that, in order to justify price discrimination on the ground of meeting the equally low price of a competitor, the defendant must have known of the competitor's price before setting its own price. It is not sufficient to show, ex post facto, that a competitor did offer an equally low price, unknown to Atlas. Likewise, such justification cannot be established by a mere showing that a competitor "threatened" to cut prices.

If a competitor's goods normally sell at a low price, either because of lower grade or quality or less public

acceptance (as in the case of unadvertised brands), a meeting of such a price may be held to be lacking in good faith, since meeting such a competitor's price is unnecessary to meet his competition.

If a seller uses pricing methods which result in some customers being regularly and systematically charged higher prices than others, his lower prices, even though the same as his competitor's prices, will not be held to have been made to meet those prices.

78] Plaintiff's Requested Instruction No. 6

The statute under which this action is brought forbids price discriminations, as previously defined, "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who . . .grants. . . such discrimination . . ."

You will observe the words "may be" and "tend" in the portion of the statute just quoted. The discrimination does not have to actually have lessened competition or created a monopoly. It is sufficient if the acts are such that there is a reasonable possibility that there may be a lessening of competition or that they would tend to create a monopoly. The purpose of this law is to prevent injury to competition or creation of a monopoly, and if you find from the evidence that such acts were committed by Atlas and that there is such a tendency your verdict must be for the plaintiff, The Elgin Corporation.

In determining whether there is such a tendency, you may consider evidence, if any, of whether the defendant's purpose was to destroy competition or create a monopoly, but you are instructed that the defendant is liable for such acts regardless of its purpose if their "effect may be substantially to lessen competition or tend to create a monopoly," as already explained. Since the defendant is a corporation, incapable of having a purpose of its own, you shall consider the purpose of its officers, directors, and authorized agents as that of the corporation.

In weighing the possible effect of such acts on

competition and their tendency to create a monopoly, you may consider the size of the defendant corporation, its economic power, and its position in the concrete building block business in the area in which it operates. The tendency toward monopoly and possible effect on competition depend to a great extent on these factors.

79] Of course, if you find from the evidence that there has been an actual, substantial lessening of competition or that some degree of a monopoly has been created by the acts complained of, the "effect" requirements of the statute will have been met, and in that event you need not consider the possible future effects but should return a verdict in favor of the plaintiff.

A monopoly, for the purpose of this type of action, need not be nationwide. It may involve only a segment of the market, and it need not be complete within that segment. The segment of the market with which we are concerned here is the area in which plaintiff and defendant operate.

In determining the effect of price discrimination on competition, you should keep in mind that both plaintiff and defendant are manufacturers and compete only at the wholesale level, in sales to dealers and contractors. The plaintiff also sells at retail, but the defendant does not. If you find that the plaintiff has lost dealers, contractors, or specific jobs, as the result of price discriminations by Atlas, you may consider the effect of these items on competition.

The effect on the plaintiff itself should be considered in connection with the question of the possible effect on competition. If you find that the plaintiff has been injured by price discriminations of the defendant or that such acts have made it less able to compete with the defendant, you may consider that alone as sufficient evidence that the effect of such acts has been or may be substantially to lessen competition.

80] If you find that the amount of any such discrimination is sufficient to give a substantial competitive advantage to the seller or the favored purchaser, a finding of reasonable probability of resulting substantial injury

to competition is adequately supported.

In weighing the evidence concerning the possible effect of such discriminations, you should keep in mind that cinder concrete building blocks are a relatively high weight-low cost product for which the cost of transportation becomes an increasing proportion of the total cost to purchaser as the delivery distance increases, and for which a reduction of a few cents becomes very important to competition.

As between the discriminator and his competitors the theory of the law is that the higher price to some purchasers supports the lower price to others and that the injury results in part from the higher price even though only the lower price (as in local price cutting) directly results in competitive injury.

81] Plaintiff's Requested Instruction No. 7

The law permits a plaintiff injured by price discrimination to recover for damages to his business or property resulting therefrom. If you find from the evidence that The Atlas Building Products Company violated the laws of the United States in any of the manners previously outlined, you shall next determine whether or not The Elgin Corporation suffered any injury to its business or property by reason of such violations.

In determining damages, if any, you may consider as one of the elements any profits that may have been lost by Elgin in its cinder concrete building block business. In this connection, it is not necessary that Elgin would have made a profit but for the price discriminations, if any. If Elgin lost more money, that is, showed a larger net operating loss, than it would have if there had been no price discriminations, the additional loss will be considered the same as lost profits.

You may further take into consideration as one of the elements of damage, if any, the extent to which the value of Elgin's property, that is, the net worth of its assets, or the value of the corporate business, has been diminished as a result of the defendant's alleged wrongful acts.

The Elgin Corporation vs. The Atlas Building Products Co.

An award of damages must be based on evidence presented in the trial of the case and not on speculation or conjecture. However, damages in a case of this kind are not always capable of precise calculation, and a wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision. The fact that the plaintiff has been damaged by the acts complained of must be clearly established by the evidence, but the extent of the damages may be based on just and reasonable inference, although the result be only approximate.

82] If you find the issues in favor of the plaintiff, you must return a verdict for at least nominal damages, that is, $1.00, and the maximum amount for which you may return a verdict is $75,000.00.

83] Plaintiff's Requested Instruction No. 8

Under the law applicable to this case, if you decide the issues in favor of the plaintiff you may award damages accruing between January 5, 1952, and the present date.

In addition, if you find from the evidence that there were any acts of price discrimination by the defendant which occurred before January 5, 1952, but which were not discovered by the plaintiff until after that date, you may also award damages for any injuries resulting therefrom.

Lack of discovery of a price discrimination may relate either to a price exacted by Atlas in New Mexico or to comparable prices exacted by Atlas in Texas at or about the same time.

Filed Oct. 19, 1956.

84] Defendant's Requested Instructions

Burges, Scott, Rasberry & Hulse and
Rodey, Dickason, Sloan, Mims & Akin
By John P. Eastham

All the following instructions requested by the defendant are refused except as may be included in the Court's general charge to the jury.

Carl A. Hatch
Judge

85] Defendant's Requested Instruction No. 1

You are instructed that the first element which must be proven by the plaintiff by a preponderance of the evidence is a discrimination in price by the defendant between different purchasers of similar commodities. In connection with this I instruct you that mere differences in price do not establish discrimination in prices. In order for price differences to constitute price discrimination, the price differences must be between competing purchasers; that is purchasers in similar circumstances as to area, other sources of supply and general competitive conditions. Thus if you find that the plaintiff has failed to prove by a preponderance of the evidence that the defendant charged different prices to competing purchasers, you must return your verdict in favor of the defendant.

86] Defendant's Requested Instruction No. 2

You are instructed that the second element which must be proven by the plaintiff by a preponderance of the evidence is that price discrimination by the defendant, if such price discrimination is found by this jury, has probable harmful effects, or to quote the exact words of the statute, "Where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them." In ascertaining the presence or absence of these harmful effects, one factor which must be considered is the price paid by the ultimate consumers of Atlas block as compared with the prices paid by the ultimate consumers of Elgin block. Other factors you should consider include the amount of block sold in the area by Atlas as compared with the amount sold by Elgin, the reasons given by purchasers for Atlas block or Elgin block and the purposes of Atlas in pricing the block as it did. Thus if you find that the plaintiff has failed to prove by a preponderance of the evidence that price discrimination by the defendant, if such price discrimination is found by you, has probable harmful effects, then you must return your verdict in favor of the defendant.

87] Defendant's Requested Instruction No. 3

You are instructed that a differential in prices charged by defendant to different competing customers does not constitute a violation of the law where such price differentials were made by defendant in good faith to meet equally low prices of a competitor. Such meeting of equally low prices of a competitor is an absolute defense for the defendant. Therefore, if you find from a preponderance of the evidence that the differentials in prices charged by defendant to different competing purchasers were made in good faith to meet equally low prices of a competitor, you must return your verdict in favor of the defendant. In considering the meeting of equally low prices in good faith, you should compare prices at the consumer level, that is the level of contractor and retail sales. Thus if you find that the prices charged to contractors and at retail for Atlas block in the Silver City area is higher than the price charged to contractors and at retail for Elgin block or other block, you must return your verdict for the defendant.
See Standard Oil Company vs. Federal Trade Commission, 340 U.S. 231, 246-7, 95 L. Ed. 239, 249-50 (1951).

88] Defendant's Requested Instruction No. 4

On the question of damages you are instructed that the plaintiff can recover only those damages, if any, which the plaintiff has proven by a preponderance of the evidence to have been proximately caused by the price discrimination, if any, of the defendant. In connection with this, you are instructed that you cannot find any damages for the plaintiff unless you first find that plaintiff has proved by a preponderance of the evidence that the defendant has discriminated in prices between competing purchasers, which discrimination, if any there was, tended to injure competition, and that such prohibited discrimination has proximately caused injury to the plaintiff's block business. You are instructed that you are not allowed to speculate or surmise as to the proximate cause of the damages suffered by the plaintiff. The mere fact that the plaintiff has suffered losses over the years does not necessarily prove that such losses were proximately caused by actions of the defendant. The plaintiff must satisfy you by a preponderance of the evidence that damages to his business or property were caused by losses in his block business brought

on by the forbidden action of the defendant as distinguished from losses in other businesses conducted by the plaintiff. If the plaintiff has failed to satisfy you by a preponderance of the evidence as to any of these items of causation, then you must return your verdict for the defendant. Further, the plaintiff must prove by a preponderance of the evidence the amount of any such proximately caused damages. You are not allowed to speculate or surmise as to the amount of damages, if any. If the plaintiff has failed to prove by a preponderance of the evidence to your satisfaction any ascertainable amount of damages, then you must return your verdict for the defendant.

89] Defendant's Requested Instruction No. 5

Further on the question of damages, the plaintiff cannot recover any damages suffered before January 5, 1952.

90] Defendant's Requested Instruction No. 6

The Court instructs the Jury that it is the object of the Anti-Trust Laws of the United States to insure the existence of competition in business. As a consequence you should bear in mind that competition is to be fostered and that conduct on the part of the defendant in carrying on business competition with its competitors, including the Elgin Corporation, in not unlawful and is actually approved and fostered by the law.

91] Defendant's Requested Instruction No. 7

You are instructed that the law does not prohibit differences in net mill returns to any manufacturer. The term "net mill return" means the amount received by the manufacturer after deducting the amount charged for freight to the consumer. You are instructed that if the only differences in price that you find are differences in net mill returns from differing competitive areas, then you must find the issue of price discrimination in favor of the defendant.

92] Defendant's Requested Instruction No. 8

You are instructed that as a matter of law if the prices charged the ultimate consumer by the defendant, Atlas Building

Products Company, or its dealers, have been consistently higher than the prices charged to such ultimate consumers by manufacturers of competing products or their dealers, you must find that there has been no tendency to injure competition or create a monopoly and you must therefore find the issues in favor of the defendant.

This does not mean, however, that a tendency to injure or destroy competition can properly be inferred from the mere fact that the block of the defendant corporation may at times have been sold to the ultimate consumer at prices below prices at which its competitors' blocks have been sold to the ultimate consumer.

93] Defendant's Requested Instruction No. 9

You are instructed that the applicable statute of limitations touching actions of the present type is four years. Therefore, the plaintiff may not maintain an action or recover damages by reason of any conduct of the defendant unless the same occurred within the four year period next preceding January 5, 1956.

Filed Oct. 19, 1956.

94] Defendant's Requested Interrogatories To The Jury

1. Did the defendant discriminate in price between different purchasers of concrete cinder building block of like grade and quality where such purchasers were competitors of each other?

Answer _____(yes or no)

2. If the answer to question one is no, no further questions need be answered. If the answer to question one is yes, was the effect of such discrimination such that it might substantially lessen competition or tend to create a monopoly in any line of commerce or tend to injure, destroy or prevent competition with the defendant?

Answer _____(yes or no)

3. If the answer to question two is no, no further questions need be answered. If the answer to question two is yes, was the discrimination in prices by the defendant made in good faith to meet an equally low price of a competitor?

Answer _____(yes or no)

4. If the answer to question three is yes, no further questions need be answered. If the answer to question three is no, was the plaintiff damaged in his business property as a proximate result of the discrimination in prices by the defendant?

Answer _____(yes or no)

5. If the answer to question four is no, no further questions need be answered. If the answer to question four is yes, what was the dollar amount of damages so proximately caused to the plaintiff?

Answer $_____.

95] Burges, Scott, Rasberry & Hulse and
Rodey, Dickason, Sloan, Mims & Akin
By John P. Eastham

Filed Oct. 19, 1956.

[Reporter's Transcript.]

Instructions

Members of the Jury:

Among certain exceptions in the law are the following:

"That nothing contained in this act shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Under another section of the statute, unnecessary to quote, it is provided that any person injured by such unlawful discrimination in price may bring an action for damages.

At this time it is sufficient to say the plaintiff charges that the defendant, The Atlas Building Products Company, discriminated in price between different purchasers of concrete cinder building blocks and thereby the law was violated, and by reason of such violation plaintiff was injured in its business and property.

On account of such alleged violation of the law and further allegations of injuries to it in its business at Silver City, New Mexico, plaintiff prays judgment against the defendant in the sum of $75,000.00.

The defendant denies all charges of unlawful price discrimination and of injury to the plaintiff and affirmatively alleges that if lower prices were charged in the area where plaintiff conducted its business, or elsewhere, such lower prices were only to meet competition and that whatever acts it did were lawful and not in violation of the laws of the United States.

Thus, most generally and very briefly, the issues between plaintiff and defendant are outlined to you. Other matters the jury will have to determine, will be explained to you later in these instructions.

Upon the state of the pleadings thus outlined to you, the burden of proof rests upon the plaintiff to establish by a preponderance of evidence in the case, the essential elements necessary to constitute a cause of action in its behalf and against the defendant. The essential elements, which must be established by a preponderance of the evidence, are:

A violation of the act and damages to plaintiff proximately resulting from the acts and conduct of the defendant which constitute the violation of the act.

In order to authorize you to return a verdict in favor of the plaintiff, you must find by a preponderance of the evidence that the defendant, The Atlas Building Products

Company, did in the course of commerce, directly or indirectly, discriminate in price between different competing purchasers of concrete cinder building blocks of like grade and quality.

Price discrimination, as that term is used in the statute, simply means that a seller of commodities of like grade and quality, to different purchasers, gives to one of the purchasers an advantage in price not accorded or given to other purchashers. The price advantage may be by a lower price or by rebates or discounts, or other benefits given to the favored purchaser and not given to the others.

The price discrimination, such as I have defined to you, is not alone sufficient to constitute a cause of action, for under the statute the price discrimination must be such as might lessen competition or tend to create a monopoly, or injure, destroy or prevent competition. The evil results at which the statute is directed and which the law seeks to prevent are the reasonable possibility of the substantial lessening of competition, the tendency to create a monopoly, or the injury, destruction or prevention of competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them. Therefore the acts of the defendant must not only amount to price discrimination but that price discrimination must be sufficient to constitute the evil which the law seeks to prevent.

As I have told you, the price discrimination charged in the complaint by the plaintiff must be established by a preponderance of the evidence, and it must be sufficient to warrant you in drawing the reasonable and logical inference therefrom that the price discrimination was such that it might lessen competition, or tend to create a monopoly, or injure, destroy or prevent competition, with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them.

In addition to the actual price discrimination it must also be established by a preponderance of the evidence that the plaintiff was injured in its business or property as the proximate result of unlawful acts of the defendant.

If the price discrimination and injury to the plaintiff, which I have outlined to you, have been proved by a preponderance of the evidence in the case, it will be your duty to return your verdict in favor of the plaintiff, assessing its damages at such sum as will reasonably and fairly compensate it in light of the instructions I shall hereinafter give you as to the measure of damages.

If, to the contrary, the essential elements I have just described to you have not been established by the evidence, or if you should further find that whatever acts, if any, were committed by the defendant, the same were justified in the light of the instructions I shall hereinafter give to you, then your decision must be for the defendant.

Considering what I have already said, it may be of assistance to you if I further instruct you concerning the meaning of language which appears in the statute. From the expression "may substantially lessen competition" it might be thought competition would actually have to be lessened. Such is not the case; the word "may" indicates it is sufficient if the unlawful acts are such that the effect might substantially lessen competition. Therefore the actual lessening of competition is not required. The word "substantially" does indicate that a reasonable possibility of lessening competition must exist. It must not be imaginary or illusive, but must constitute a reasonable possibility that competition may be lessened. The same is true of the words "tend to create a monopoly." The evidence does not have to establish that a monopoly actually occurred. It is sufficient if there is a reasonable possibility that unlawful acts of the defendant, if the same have been proved, did tend to create a monopoly; that is, if sufficiently continued, the natural and probable consequence would be that a monopoly would be created. The other words which appear in the statute, "injure, destroy or prevent competition" need no defining. You should give to them their ordinary and customary meaning.

Although price discrimination with the reasonable possibility of producing the harmful effects I have explained must be established by the evidence, it is not incumbent upon the plaintiff or necessary for it to prove that the defendant intended to discriminate in price to the

extent and in a manner that would constitute a violation of the law by causing or tending to cause the harmful effects I have mentioned. In brief, the intent to lessen competition or create a monopoly, or injure, destroy or prevent competition, is not an element or factor of the offense created by the law.

A price discrimination may exist if a seller exacts different prices from its customers and the difference is not justified by a specific provisions of the statute, where one "leg" of the price differential is across state lines and this differential affects or has a tendency to affect competition in the ways I have mentioned. "Price" in this connection, to use a technical term, is "mill net return," which means that a manufacturer is sometimes required to realize the same net price in all sales of commodities of like grade and quality, adding thereto the actual cost of transportation. This is especially true, when, to do otherwise, would produce or cause the evil effects against which the provisions of the Robinson-Patman Act are aimed and directed; that is, the reasonable possibility of lessening competition or the tendency to create a monopoly.

Thus the jury has a right to consider any difference in prices charged at El Paso and prices exacted by it in New Mexico.

At least two sales are necessary to constitute a price discrimination. The plaintiff is entitled to compare each mill net price exacted by Atlas in New Mexico with the highest mill net price exacted by Atlas in Texas for a commodity of like grade and quality at or about the same time. It is not necessary that such sales occur during the same day, week or month for you to draw this comparison. No arbitrary time limit is provided by law. You may compare prices exacted by Atlas during any period in which there has been no general advance or reduction in Atlas' prices.

You are instructed that the law prohibiting discrimination in prices does not mean that one engaged in interstate commerce can never reduce or lower prices in one area and not make the same reduction in other areas where its commodity may be sold under different competitive or other conditions. Neither does a mere difference in price necessarily

constitute discrimination in price. Price discrimination of and in itself alone is not forbidden by the law. Price discrimination is unlawful where the deleterious or harmful consequences I have explained to you are reasonably possible.

In ascertaining the presence or absence of these harmful effects, one factor which may be considered is the price paid by the ultimate consumers of Atlas block as compared with the prices paid by the ultimate consumers of Elgin block. Other factors you may consider include the amount of block sold in the area by Atlas as compared with the amount sold by Elgin, and the reasons given by purchasers for purchasing Atlas block or Elgin block.

You may also include in your consideration any and all evidence showing or tending to show any discounts, rebates, special services, commissions or facilities of a substantial nature and anything of value, if any such have been proved, given to any customer that is not available on the same basis to all other customers.

You may also consider the size of both the plaintiff and defendant corporations, their economic power and the relative positions of both in the concrete building block business in the areas where they operate. All the factors I have set forth and all facts disclosed by the evidence which throw light upon or tend to shed light upon the question of the acts prohibited by the statute, and their effect, should be weighed by you in determining whether such acts did or might be such as would substantially lessen competition or tend to create a monopoly, or injure, destroy or prevent competition.

Because the law declares the forbidden price discrimination must occur between different purchasers it is obvious there must be at least two purchasers from the common seller of a commodity of like grade and quality. Inasmuch as plaintiff, The Elgin Corporation, was not a purchaser from The Atlas Building Products Company, the evidence must disclose there were at least two purchasers from Atlas, independent and exclusive of The Elgin Corporation. In addition to being at least two purchasers, the evidence must further disclose that Atlas sold a commodity of like grade

and quality to different purchasers at different prices. The different prices charged and received by Atlas, if such has been shown, must be a difference sufficient to constitute price discrimination as I have defined that term to you, for as I told you it is not every difference in price that constitutes price discrimination. For instance, the law does not require that a seller must always sell at the same price in every area. Circumstances or certain conditions may justify a lower price in one area than is charged in another. However, where there are at least two purchasers in the same area and a general competitive relationship exists the seller in this case, The Atlas Building Products Company, would have no right to give one purchaser a price advantage over the other.

Further I instruct you that it would not be necessary that the two or more purchasers in the same area be in direct competition with each other. Although not in direct competition with each other, if one purchaser is given a price advantage over the other purchaser, or purchasers, and such price advantage amounts to price discrimination in the light of the definition I have given you, the proof would be sufficient in that respect. But always you must bear in mind that in addition to price discrimination between different purchasers the evidence must also establish an injury to the plaintiff resulting from the price advantage given to the one purchaser and not to the other or others.

An affirmative defense asserted by the defendant in its answer is that if the defendant discriminated in prices, as charged in the complaint, such discrimination was made in good faith to meet an equally low price of a competitor. Where a defendant asserts an affirmative defense, such as the one I have just outlined to you, the burden of proof rests upon the defendant to establish his affirmative defense by a preponderance of the evidence. Therefore, I instruct you that even though you might believe, by a preponderance of the evidence, that the defendant did discriminate in price, as charged in plaintiff's complaint, nevertheless if you are satisfied by a preponderance of the evidence that such discrimination in this case was in good faith on the part of the defendant and only to meet an equally low price of a competitor, then, and in that event, you should return your verdict in favor of the defendant.

But I caution you that the right given a manufacturer in good faith to meet the lower prices of a competitor does not give the right to cut or reduce prices below the level of the competitor's prices and thereby create a price discrimination forbidden by law.

If, after considering the foregoing and all the other instructions I shall give you, you have decided to return a verdict in favor of the plaintiff, it will then be your duty to decide the extent of the damage sustained by the plaintiff corporation, and to assess those damages at such sum as you may determine will fairly and reasonably and adequately compensate it for the injury sustained.

In determining damages, if any, you may consider as one of the elements any profits that may have been lost by Elgin in its cinder concrete building block business. In this connection, it is not necessary that Elgin would have made a profit but for the price discrimination, if any. If Elgin lost more money, that is, showed a larger net operating loss than it would have if there had been no price discriminations, the additional loss will be considered the same as lost profits.

You may further take into consideration as one of the elements of damage, if any, the extent to which the value of Elgin's property, that is, the net worth of its assets, or the value of the corporate business, has been diminished as a result of the defendant's alleged wrongful acts.

An award of damages must be based on evidence presented in the trial of the case and not on speculation or conjecture. However, damages in a case of this kind are not always capable of precise calculation. The fact that the plaintiff has been damaged by the acts complained of must be clearly established by the evidence, but the extent of the damages may be based on just and reasonable inference, although the result be only approximate.

If you find the issues in favor of the plaintiff, the maximum amount for which you may return a verdict is $75,000.00.

I further instruct you in connection with damages that you have heard evidence as to acts and conduct from the

year 1946 to the present, but when you come to consider the question of damages, if you do, you are limited from January 5, 1952, down to and including the present. Any award made for the plaintiff can only be assessed for injuries arising between the dates I have mentioned. No damages can be assessed by you for injuries occurring before January 5, 1952, if any such did occur.

While I have fully explained to you that no cause of action can exist in favor of the plaintiff, and against the defendant, unless the plaintiff, The Elgin Corporation, was injured in its business or property by unlawful acts of defendant, The Atlas Building Products Company, I desire now to make it clear to you that it must be shown by a preponderance of the evidence that there is a causal connection between the injuries sustained, if any, and the unlawful acts. If the plaintiff did suffer injury in its business on account of unlawful price discrimination by the defendant, the plaintiff is entitled to recover damages from the defendant, but although plaintiff may have suffered business losses, and the defendant may have violated the law in the respects I have mentioned, still if plaintiff's losses were unrelated to, disconnected with and not occasioned by the unlawful acts of the defendant, the plaintiff cannot recover.

Further, if you should determine from the evidence that plaintiff did sustain losses and injury to its business or property, but such losses and injuries were occasioned and caused by conditions or matters separate and distinct and apart from any wrongful or unlawful acts by the defendant, your verdict would have to be in favor of the defendant, no matter how serious the losses sustained by plaintiff might have been.

Heretofore I have mentioned occasionally that in order to constitute a violation of the law the transactions with which the case is concerned must involve interstate commerce. In this connection I instruct you that the defendant, The Atlas Building Products Company, admits that it is engaged in interstate commerce. Therefore, you may take that fact as proved and it need not concern you when you begin to deliberate upon your verdict.

During the progress of the trial you have heard a great

deal concerning the Robinson-Patman Act and its purposes. In the main I agree with nearly everything that counsel in the case have said about the Act and its purposes. Because there has been so much discussion of it, I think I should further comment about the Act itself.

As you will observe from the mere reading of the law, its purpose is to prevent those discriminatory practices which might lessen competition, or tend to create a monopoly, or prevent or destroy competition. It was the obvious intent of the Congress to enact legislation which would foster and promote competition; it was never intended that the law should be used as an instrument to stifle or prevent competition or as a means to create monopolies. While its primary purpose was to give some measure of protection to the small business, as against unlawful practices by a strong and powerful competitor, it does not exclude or preclude the large business from entering into any field and competing legitimately with others engaged in a like business enterprise.

You will now retire to your jury room, where you may first proceed to elect your foreman, but before you begin your deliberations it will be necessary that I pass upon certain legal questions, which I am sure will be raised by counsel, after you have retired. It is possible that after hearing further discussion by the attorneys in the case, I might want to give you additional instructions. It is for that reason that I ask you not to begin deliberations immediately. You will wait to begin your deliberations until I send word to you by your bailiff. You may now retire.

Objections To Court's Instructions

By The Court: Now that the jury has retired and before they begin their deliberations counsel must take their exceptions to the Court's general charge in order to perfect your record.

By Mr. Blythe: May it please the Court. Comes now the plaintiff and objects to the charge of the Court to the jury in the following respects:

I. In that in setting forth the provisions of the law

applicable to this case the Court quoted certain provisions of the law which are not applicable to this case and might mislead the jury, to-wit:

The proviso to the effect that nothing contained in the act shall prevent a seller from selecting its own customers, and the proviso regarding changed or changing market conditions; and neither of which are issues in this case.

II. That the Court instructed to the effect that the defendant could "meet competition" and that it could take into consideration in setting its pricing policy general competitive conditions, neither of which are in accordance with the law and are particularly repugnant to the provision regarding the defense of meeting the equally low price of a competitor.

III. That the Court instructed the jury that the sales, to be discriminatory, must be to "different competing purchasers", which is not the law.

IV. That the charge of the Court put the burden of proof on the plaintiff as to the harmful effect of the price discrimination, whereas the burden of proof is on the defendant to negative the presumption that a harmful effect would result from such discrimination.

V. That the Court instructed the jury that in considering the effect of the price discrimination, if any, it might consider the price paid by the ultimate consumer and the reasons given by purchasers for buying Atlas block, neither of which is permitted by the statute. And it being the contention of the plaintiff that the parties are in competition only on the wholesale level and only that level should be considered.

VI. That the Court in at least two or more instances mentioned like grade and quality of the plaintiff's product which is not an issue in this case and the jury should have been so instructed.

By The Court: Well, I don't think that is correct, Mr. Blythe. However, proceed. You are entitled to take your exception.

VII. The Court instructed the jury that the defendant could establish the defense of meeting the equally low price of a competitor without having required the defendant to show that it had knowledge of the competitor's prices at the time it established its own prices or that the plaintiff's or other competitors prices were lawful. And further, that the Court's instructions on this point failed to mention the geographical price discrimination theory.

Excuse me, Your Honor. I am supposed to be objecting to the instructions as made by the Court and not as requested by the plaintiff; is that so?

By The Court: Yes.

By Mr. Blythe: Well, then I reserve the rest of my exceptions unless you want me to proceed at this time to except to the failure to give certain of the plaintiff's instructions.

By The Court: Well, I was going to say, and I will to each counsel, the plaintiff and the defendant, each submitted requested instructions, all of which have been refused by the Court with the exception as to such parts of them may have been included in the general charge. And, of course, counsel excepts to the refusal of the Court to give their several respected requested instructions, which I will file with the reporter. I think that takes care of the record on that.

By Mr. Blythe: One further point that I didn't mention and object to the Court's charge as given.

The Court instructed in connection with the mill net return, that the seller is "sometimes required to receive the same net mill return", whereas we think that they are required to in all instances. I believe that is all.

By Mr. Eastham: Comes now the defendant and objects to the instructions of the Court on the following grounds:

1. That the Court throughout the instructions used the term "reasonable possibility" with regard to the prohibited

effect, which is contrary to the law.

II. That in some of the Court's instructions with regard to the term "price discrimination" either no mention was made of competing purchasers or the Court specifically instructed that the purchasers need not be in direct competition with each other. This is contrary to the law.

III. That the Court instructed that a manufacturer sometimes is required to have a uniform net mill return and that the jury has the right to consider differences in the net mill returns between El Paso and Silver City and could compare net mill returns over the same period of time. However, we feel this is contrary to the law.

IV. The Court instructed that the jury could consider the size, economic power and the standing in the industry of the defendant in reaching its decision as to harmful effects. We feel this is contrary to the facts and the law.

V. On the question of damages the Court instructed that the jury could consider both the question of loss of profits and the diminution of net worth. We feel that this allows the jury to double damages.

VI. The defendant also objects and excepts to the failure of the Court to give the requested interrogatories to the jury for the verdict.

By The Court: Mr. Bailiff, tell the jury that they may begin their deliberations.

Filed Jan. 31, 1956.

96] Verdict.

We, the Jury duly impaneled and sworn to try the issues between plaintiff, The Elgin Corporation, and the defendant, The Atlas Building Products Company, do find the issues in favor of the defendant.

Marion G. Wiggins
Foreman

Filed Oct. 19, 1956.

97] (Clerk's Docket Entry Of Judgment)

Oct. 19 Pursuant to the verdict of the jury this day returned in this cause and the requirements of rule 58 of the Federal Rules of Civil Procedure Judgment is hereby entered herein in favor of the defendant, The Atlas Building Products Company, and against the plaintiff, The Elgin Corporation, and that the plaintiff recover nothing in this action.

98] Judgment.

And now the above cause having come to trial before a jury, the plaintiff, The Elgin Corporation, appearing by its counsel Dee C. Blythe and Hubert O. Robertson, Esquires, and the defendant, The Atlas Building Products Company, appearing by its counsel Rodey, Dickason, Sloan, Mims & Akin, Burges, Scott, Rasberry & Hulse, J. F. Hulse, William A. Sloan and John P. Eastham, Esquires, and a jury of twelve persons having been duly impaneled and sworn and having heard the testimony of the witnesses and the arguments of counsel and the instructions of the court and having rendered its verdict finding the issues in favor of the defendant and the court being fully advised in the premises,

It Is Therefore Ordered, Adjudged And Decreed As Follows:

1. That judgment be and hereby is entered in favor of the defendant, The Atlas Building Products Company, and against the plaintiff, The Elgin Corporation, pursuant to the verdict of the jury.

2. That the request for an injunction by the plaintiff, The Elgin Corporation, be and hereby is denied.

3. That the defendant, The Atlas Building Products Company, recover its costs herein from the plaintiff, The Elgin Corporation, such costs to be taxed by the Clerk of the Court.

Carl A. Hatch
District Judge

Approved as to form: Dee C. Blythe Atty. for Pl.
Approved RDSM & A By J.P.E. Attys for D.

Filed Oct. 25, 1956.

99] Notice Of Appeal.

Notice is hereby given that The Elgin Corporation, plaintiff above named, appeals to the Court of Appeals for the Tenth Circuit from the final judgment entered in this action on October 19, 1956.

Dated November 15, 1956.

Dee C. Blythe
Hubert O. Robertson
Attorneys for Appellant

Filed Nov. 16, 1956.

101] First Amended Statement Of Points.

Comes now the Appellant for its First Amended Statement of Points says that in its appeal from the final judgment of the District Court herein it will rely upon the following points:

1. That the Court erred in denying Appellant's Amended Motion to Strike entered herein on October 8, 1956.

2. That the Court erred in admitting the testimony of Milton W. Stovall, when called as a witness for Appellee, that Appellee established its prices of cinder concrete building blocks in New Mexico to meet general competitive conditions and the prices of building materials dissimilar to Appellee's products. *

3. That the Court erred in refusing Appellant's requested instruction No. 5, to-wit:

"A seller may rebut a prima facie case of price discrimination 'by showing that his lower price or the furnishing

---

* [Clerk's Note: Withdrawn, by leave of Court. (Order of Judge Bratton, February 27, 1957.]

of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.' This defense is limited to specific situations in which a customer of the seller has been offered a lower price, or the furnishing of services or facilities, by a competitor, and in such situations the seller may only meet, and cannot cut below, the competitor's lower price, or match his offer of services or facilities. Also, the seller is justified in meeting his competitor's offer only if the competitor's price is lawful, for if his competitor's price is unlawful the seller should take legal action against the competitor rather than to take the law into his own hands. Furthermore, the seller may meet his competitor's offer only to hold a customer the seller already has, and not to gain new customers.

"A competitor's lower price, or furnishing of services or facilities, to certain customers does not justify geographic price discrimination covering a segment of the market. If you find from the evidence that the defendant reduced its mill net price in any area in which it competed with plaintiff, instead of meeting competitive offers to specific customers, you should return a verdict in favor of the plaintiff.

102] "It is admitted in this case that the plaintiff is not engaged in interstate commerce and hence is not subject to the Federal statutes against price discrimination. However, the defendant may meet, in good faith, the plaintiff's prices, services or facilities, the same as those of any other competitor. But even if you should find from the evidence that the Elgin cut its prices in certain instances Atlas would not thereby be justified in making an area-wide price cut.

"You are further instructed that, in order to justify price discrimination on the ground of meeting the equally low price of a competitor, the defendant must have known of the competitor's price before setting its own price. It is not sufficient to show, ex post facto, that a competitor did offer an equally low price unknown to Atlas. Likewise, such justification cannot be established by a mere showing that a competitor 'threatened' to cut prices.

"If a competitor's goods normally sell at a low price, either because of lower grade or quality or less public acceptance (as in the case of unadvertised brands), a meeting of such a price may be held to be lacking in good faith, since meeting such a competitor's price is unnecessary to meet his competition.

"If a seller uses pricing methods which result in some customers being regularly and systematically charged higher prices than others, his lower prices, even though the same as his competitor's prices, will not be held to have been made to meet those prices."

4. That the Court erred in refusing part of Appellant's requested instruction No. 6, to-wit:

"A monopoly, for the purpose of this type of action, need not be nationwide. It may involve only a segment of the market and it need not be complete within that segment. The segment of the market with which we are concerned here is the area in which plaintiff and defendant operate.

"In determining the effect of price discrimination on competition, you should keep in mind that both plaintiff and defendant are manufacturers and compete only at the wholesale level, in sales to dealers and contractors. The plaintiff also sells at retail, but the defendant does not. If you find that the plaintiff has lost dealers, contractors, or specific jobs, as the result of price discrimination by Atlas, you may consider the effect of these items on competition.

"The effect on the plaintiff itself should be considered in connection with the question of the possible effect on competition. If you find that the plaintiff has been injured by price discriminations of the defendant or that such acts have made it less able to compete with the defendant, you may consider that alone as sufficient evidence that the effect of such acts has been or may be substantially to lessen competition.

"If you find that the amount of any such discrimination is sufficient to give a substantial competitive advantage to the seller or the favored purchaser, a finding of reasonable probability of resulting substantial injury to competition is

adequately supported.

103] "In weighing the evidence concerning the possible effect of such discriminations, you should keep in mind that cinder concrete building blocks are a relatively high weight-low cost product for which the cost of transportation becomes an increasing proportion of the total cost to purchaser as the delivery distance increases, and for which a reduction of a few cents becomes very important to competition.

"As between the discriminator and his competitors the theory of the law is that the higher price to some purchasers supports the lower price to others and that the injury results in part from the higher price even though only the lower price (as in local price cutting) directly results in competitive injury."

5. That the Court erred in refusing that part of Appellant's requested instruction No. 7 pertaining to nominal damages, since such an award would have supported injunctive relief and an award of costs.

6. That the Court erred in refusing part of Appellant's requested instruction No. 8, to-wit:

"In addition, if you find from the evidence that there were any acts of price discrimination by the defendant which occured before January 5, 1952, but which were not discovered by the plaintiff until after that date, you may also award damages for any injuries resulting therefrom.

"Lack of discovery of a price discrimination may relate either to a price exacted by Atlas in New Mexico or to comparable prices exacted by Atlas in Texas at or about the same time."

7. That the Court erred in instructing the jury that the Appellee could justify its price discriminations, if any, by proving that it did so discriminate to "meet competition", or to meet "different competitive or other conditions", and that "circumstances or certain conditions may justify a lower price in one area than is charged in another" without defining the same.

8. That the Court erred in instructing the jury that sales at different prices, to be legally discriminatory, must be made to at least two purchasers in the same area and that a general competitive relationship must exist between them.

9. That the Court erred in instructing the jury that the burden of proof rested on the Appellant to prove that the effect of the price discriminations if any, might be substantially to lessen competition or to tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with one who grants or knowingly receives the benefit of such discrimination or the customers of either of them.

104] 10. That the Court erred in instructing the jury that, in determining the presence or absence of the harmful effects proscribed by Sec. 2(a) of the Robinson-Patman Act, 15 U.S.C.A. Sec. 13 (a), it might consider the price paid by the ultimate consumers of Appellee's block as compared to the price paid by the ultimate consumers of Appellant's block, and the reason given by purchasers for purchasing Appellee's block instead of Appellant's block.

11. That the Court erred in instructing the jury that in order for Appellant to recover there must be a causal connection between the price discriminations of Appellee and Appellant's damages, and that such damages must be the proximate result of Appellee's unlawful acts.

12. The Court erred in instructing the jury that a price discrimination "may" exist if a seller exacts different prices from its customers and the difference is not justified by a specific provision of the statute, where one leg of the price differential is across state lines and this differential affects or has a tendency to affect competition, instead of that a price discrimination necessarily <u>does</u> exist under such circumstances.

13. The Court erred in instructing the jury that mill net return means that a manufacturer is "sometimes" required to realize the same net price in sales of commodities of like grade and quality, adding thereto the actual cost of transportation, instead of that a manufacturer <u>always</u> is

required to do so, unless the differential comes within a specific provision of the statute.

14. The Court erred in instructing the jury that it "has a right" to consider any difference in prices charged at El Paso and prices exacted by it in New Mexico, instead of making such consideration mandatory.

105] Dated this 29th day of December, 1956.

Dee C. Blythe
Hubert O. Robertson
Attorneys For Appellant

Filed Dec. 31, 1956.

[By orders of the District Court filed December 10, 1956, and January 9, 1957, the time for docketing the cause in the Court of Appeals was extended to February 14, 1957. An order of the Court of Appeals was entered February 18, 1957, granting leave to docket the cause out of time, which was accordingly done.]

114] Clerk's Certificate.

United States Of America, District Of New Mexico.

I, Wm. D. Bryars, Clerk of the United States District Court for the District of New Mexico, do hereby Certify:

That the attached and foregoing pages numbered 1 to 113, inclusive, are the original pleadings, orders and other documents specified in the Designations of the Record on Appeal by the appellant and appellee in that certain civil action lately pending on the docket of said court entitled and numbered as shown by the title page of this record, except as diminished by an Order For Diminution of the Record purportedly entered in the United States Court of Appeals, Tenth Circuit, a copy of which appears at page 111 of this record.

I do further Certify: That the Reporter's Transcripts

of a Pre-Trial Conference and of the Court's Instructions to the Jury and Objections to the Court's Instructions, separately bound but forming a part of this record, are the originals of said Transcripts as certified by the Reporter and filed in my office in said cause.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at Albuquerque in said district, on this the 12th day of February, 1957.

(Seal)

Wm. D. Bryars
Clerk of said Court

Filed United States Court of Appeals Tenth Circuit, February 18, 1957, Robert B. Cartwright, Clerk.

No. 988

Office - Supreme Court, U.S.
FILED
MAY 8 1958
JOHN T. FEY, Clerk

SUPPLEMENTAL

TRANSCRIPT OF RECORD

United States Court Of Appeals

TENTH CIRCUIT

No. 5574

THE ELGIN CORPORATION, Appellant,

vs.

THE ATLAS BUILDING PRODUCTS COMPANY,
Appellee.

Appeal From The United States District Court
For The District Of New Mexico

Filed May 9, 1957.

United States Court Of Appeals

TENTH CIRCUIT

No. 5574

THE ELGIN CORPORATION, Appellant,

vs.

THE ATLAS BUILDING PRODUCTS COMPANY,
Appellee.

Appeal From The United States District Court
For The District Of New Mexico

INDEX.

	Orig.	Record
Plaintiff's first amended designation of record on appeal	107	1
Defendant's designation of additional record on appeal	109	3
Clerk's certificate	114	4
Order for supplemental record	--	5
Amended answer	S-1	5
Clerk's certificate	S-4	8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Pleas And Proceedings Before The Honorable Carl A. Hatch, United States District Judge For The District Of New Mexico, Presiding In The Following Entitled Cause:

THE ELGIN CORPORATION, Plaintiff

vs.

THE ATLAS BUILDING PRODUCTS COMPANY,
Defendant.

No. 3054, Civil.

107] First Amended Designation Of
Record On Appeal.

Pursuant to Rule 75 (a) the Appellant for its First Amended Designation of Record on Appeal hereby designates the following portions of the record, proceedings and evidence to be contained in the record on its appeal from the final judgment herein:

1. Complaint filed herein on January 4, 1956, as amended by interlineation pursuant to order entered on February 15, 1956.

2. Defendant's Answer to Plaintiff's Application for Preliminary Injunction filed herein on January 19, 1956.

3. Affidavit of Milton W. Stovall and Erwin H. Hahn filed herein on January 30,1956.

4. Defendant's Original Answer filed herein on February 29, 1956.

5. Interrogatories by Plaintiff to Defendant, Nos. 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 39 and 40 filed herein on March 6, 1956 and defendant's answers to same filed herein on March 22, April 17, June 27 and August 7, 1956.

6. Portion of transcript of pre-trial conference, pages 77-81 and 86, entered herein on September 27, 1956, in lieu of a pre-trial order, insofar as same pertains to leave granted defendant to amend its answer and to plaintiff to move to strike same and to serve further interrogatories.

7. Further Interrogatories by Plaintiff to Defendant, Nos. 1, 2, 3, 4, 5 and 9, filed herein on September 14, 1956, and defendant's answers to same filed herein on October 8, 1956.

108] 8. Plaintiff's Motion to Strike filed herein on October 4, 1956.

9. Plaintiff's Amended Motion to Strike filed herein on October 8, 1956.

10. Order Denying Motion to Strike, entered herein on October 25, 1956, as of October 8, 1956.

11. The testimony in question and answer form of Milton W. Stovall when called as a witness for Appellee.

12. Plaintiff's Requested Instructions numbered 5, 6, 7 and 8.

13. The Court's Instructions to the Jury.

14. Plaintiff's objections to the Court's Instructions to the Jury.

15. Verdict of the jury.

16. Judgment entered by the clerk on October 19, 1956.

17. Final judgment entered on October 25, 1956.

18. Notice of Appeal filed November 15, 1956.

19. Order Extending Time filed herein on December 10, 1956.

20. First Amended Statement of Points on which Appellant relies, served herewith.

21. This designation.

Dated December 29, 1956.

Dee C. Blythe
Hubert O. Robertson

Certificate Of Service

I certify that a copy of the foregoing instrument was mailed this 29th day of December, 1956, to defendant's counsel of record.

Dee C. Blythe

Filed Dec. 31, 1956.

109] Additional Designation Of Record On Appeal.

Pursuant to Rule 75 (a) the defendant hereby designates the following additonal portions of the record, proceedings and evidence to be included in the record of the appeal by the plaintiff from the final judgment herein:

1. Amended Answer of defendant.

2. All of the exhibits which were introduced at the trial on the merits and which were received in evidence by the Court.

3. All of the testimony of the following witnesses in the trial on the merits in question and answer form: Robert Elgin, Joe B. Turner, Milton W. Stovall, Thomas W. Foy, Ervin H. Hahn, William Parish, William Russell, Harold Bishop, Howard Cearley, N. N. McCrary, J. V. Glenn, W. E. Johnson, Joe Hannawalt, Carl Hansen,R. R. Ellerson.

4. Defendant's motion to dismiss at the close of the plaintiff's case.

5. Defendant's motion to dismiss at the close of all of the evidence.

6. The requested instructions of the defendant.

110] 7. The defendant's objections to the instructions of the Court.

8. This additional designation.

Burges, Scott, Rasberry & Hulse and
Rodey, Dickason, Sloan, Mims & Akin
By John P. Eastham

We Hereby Certify That We Have Mailed A Copy Of The Foregoing Pleading To Opposing Counsel Of Record This Jan - 7 1957

Rodey, Dickason, Sloan,
Mims & Akin
By John P. Eastham

Filed Jan. 7, 1957.

114] Clerk's Certificate.

United States Of America, District Of New Mexico.

I, Wm. D. Bryars, Clerk of the United States District Court for the District of New Mexico, do hereby Certify:

That the attached and foregoing pages numbered 1 to 113, inclusive, are the original pleadings, orders and other documents specified in the Designations of the Record on Appeal by the appellant and appellee in that certain civil action lately pending on the docket of said court entitled and numbered as shown by the title page of this record, except as diminished by an Order For Diminution of the Record purportedly entered in the United States Court of Appeals, Tenth Circuit, a copy of which appears at page 111 of this record.

I do further Certify: That the Reporter's Transcripts of a Pre-Trial Conference and of the Court's Instructions to the Jury and Objections to the Court's Instructions, separately bound but forming a part of this record, are the originals of said Transcripts as certified by the Reporter and filed in my

office in said cause.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at Albubuquerque, in said district, on this the 12th day of February, 1957.

(Seal)

Wm. D. Bryars
Clerk of said Court

Filed United States Court of Appeals Tenth Circuit, February 18, 1957, Robert B. Cartwright, Clerk.

In the United States Court of Appeals for the Tenth Circuit.

Thirtieth Day, March Term, Wednesday, May 1st, 1957.

Before Honorable Sam G. Bratton, Chief Judge

The parties having stipulated that the Amended Answer of Defendant, filed in this action on October 4, 1956, was inadvertently omitted from the Order for Dimunition of the Record entered on February 27, 1957, and it appearing that said Amended Answer is essential to the determination of the issues in this case.

It Is Ordered that the clerk of the District Court of the United States for the District of New Mexico be and he hereby is authorized and directed to prepare a Supplemental Record containing said Amended Answer and to certify same to the clerk of this Court.

Done at Albuquerque, New Mexico, this 29th day of April, 1957.

S-1] Amended Answer Of Defendant.

First Defense

That the plaintiff's Bill of Complaint fails to state a claim against defendant upon which relief can be granted.

The Elgin Corp. vs. The Atlas Building Products Co.

Second Defense

(1) Defendant denies all the allegations contained in paragraphs 5, 6, 8, 9 and 10 of plaintiff's Bill of Complaint.

(2) Defendant agrees that the principal product in the concrete cinder building block business is the 8" x 8" x 16" block; but it says that it makes many other kinds and sizes of block most of which plaintiff does not make. Defendant also says it has bid with contractors on block and many jobs and has obtained the contract to supply block on many of those jobs, and that defendant's prices have varied from time to time and place to place. Defendant knows of only one job on which it bid and on which plaintiff also bid, and in that instance plaintiff was the successful bidder, but defendant was never advised of the price bid by plaintiff. Except as the foregoing statements relate to allegations in paragraph 7 of plaintiff's complaint, all allegations in paragraph 7 are denied. Defendant particularly alleges that it has not sold block at less than cost, nor has it transported or caused to be transported block at less than cost; and that it has not given discounts or rebates off of the price at which it has sold block to its customers in New Mexico.

S-2] (3) Defendant says that only a small part of the block sold by it in New Mexico have been sold in competition with plaintiff.

(4) Defendant denies that it systematically has sold to dealers and contractors in New Mexico at prices lower than prices at which sales were made by defendant in Texas to dealers and contractors either by reason of actual lower prices or by reason of discounts and rebates. Defendant says that its sales to contractors in the area in which plaintiff does business have been for prices as high as the prices at which a large and substantial part of the defendant's sales to contractors in Texas have been made and were sold at prices higher than the prices at which plaintiff sold or offered to sell. Defendant further says that it has not so far as it knows sold to dealers below the price at which plaintiff sold to dealers and in this connection further says, that prior to the time of the filing of this suit, plaintiff had not known at what price or prices plaintiff sold to dealers or contractors. Defendant further says that generally speaking, defendant's block has

been sold in the Silver City area at a price higher than plaintiff's block has been sold or offered for sale in said area; and defendant further says it generally has been able to sell and has sold its block in the Silver City area for a higher price than plaintiff sold or offered to sell its block; and that factors other than price entered into defendant making its said sales at such higher prices such as, but not limited to, the quality of the respective block.

(5) Defendant denies that it has done any acts the effect of which may be substantially to lessen competition or tend to create a monopoly in a line of commerce or to injure, destroy or prevent competition by plaintiff with defendant, and further says that no legal liability for damages is imposed by law upon defendant for any acts which "may" result in certain conditions or which "tend" towards certain conditions, as acts which "may" result in, or "tend" toward certain conditions also "may not" result in or "tend" toward such conditions, and are, therefore, not illegal; and a tendency toward a condition which is illegal is not unlawful, but is unlawful only if acts are done with the intent they shall result, or actually do result, in the proscribed conditions; and plaintiff may not recover any damages unless as a proximate result of acts which are unlawful, plaintiff has suffered actual damages.

S-3] Third Defense

Comes now defendant and pleads in bar of the alleged cause of action asserted by plaintiff the four-year statute of limitation of the Statutes of Limitation of the State of New Mexico, which four-year statute is here specially plead in bar of said alleged cause of action asserted by plaintiff.

Fourth Defense

Comes now defendant and specially pleads in bar of the alleged cause of action asserted by plaintiff the statute of limitation contained in the Acts of the Eighty-fourth Congress of the United States of America, being chapter 283-Public Law 137, of the Acts of the Eighty-fourth Congress.

Fifth Defense

That if the defendant has discriminated in prices, which

discrimination is specifically denied, such discrimination was made in good faith to meet an equally low price of a competitor.

Wherefore, defendant prays that it have the judgment of the Court that the plaintiff take nothing by its suit, that judgment be entered in favor of the defendant, that the defendant recover its costs herein and for such further relief as to the Court may seem just.

Burges, Scott, Rasberry & Hulse
And
Rodey, Dickason, Sloan, Mims & Akin
By John P. Eastham
Attorneys for Defendant, The Atlas Building Products Co.

Filed Oct. 4, 1956.

S-4] Clerk's Certificate.

United States Of America, District Of New Mexico.

I, Wm. D. Bryars, Clerk of the United States District Court for the District of New Mexico, do hereby Certify:

That the attached and foregoing is the original of the Amended Answer of the Defendant filed in my office in that certain civil action lately pending on the docket of said court entitled and numbered as shown on the title page of this record and is transmitted to the United States Court of Appeals, Tenth Circuit, as a Supplemental Record on Appeal pursuant to an order of the United States Court of Appeals dated April 29, 1957, a duly attested copy of which is on file in my office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at Albuquerque, in said district, on this the 7th day of May, 1957.

(Seal)

Wm. D. Bryars
Clerk of said Court

Filed United States Court of Appeals Tenth Circuit, May 9, 1957, Robert B. Cartwright, Clerk.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAY 8 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 988

THE ELGIN CORPORATION,

Petitioner,

v.

THE ATLAS BUILDING PRODUCTS CO.,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

DEE C. BLYTHE,
P. O. Box 829,
Clovis, New Mexico.
HUBERT O. ROBERTSON,
P. O. Box 349,
Silver City, New Mexico.
Attorneys for Petitioner.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statute and Rule Involved	3
Statement of the Case	4
Reasons For Granting the Writ	7
Conclusion	20
Appendix	21

Table of Cases

Alcaro v. *Jean Jordeau, Inc.*, (3rd Cir., 1943) 138 F.2d 767	19
American Can Co. v. *Russellville Canning Co.*, (8th Cir., 1951) 191 F.2d 38	10
Anheuser Busch, F.T.C. Dkt. 6331	13
Beckwith v. *Bean*, (1879) 98 U.S. 266, 25 L.Ed. 124	17
Bond Crown & Cork Co. v. *F.T.C.*, (4th Cir., 1949) 176 F.2d 974	10
Burton v. *West Jersey Ferry Co.*, (1885) 114 U.S. 474, 5 S.Ct. 960, 29 L.Ed. 215	17
City of Knoxville v. *Bailey*, (6th Cir., 1955) 222 F.2d 520	16, 19
Corn Products Refining Co. v. *F.T.C.*, (1945) 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320	10
E. Edelmann & Co. v. *F.T.C.*, (7th Cir., 1956) 239 F.2d 152, cert. den. (1958) — U.S. —, 78 S.Ct. 426 2 L.E. 2d 422	8, 13, 18
Evansville Container Corp. v. *McDonald*, (6th Cir. 1942) 132 F.2d 80	19
F.T.C. v. *A. E. Staley Mfg. Co.*, (1945) 324 U.S. 746, 65 S.Ct. 971, 89 L.Ed. 1338	10, 11
F.T.C. v. *Cement Institute*, (1948) 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010	10, 13
F.T.C. v. *Morton Salt Co.*, (1948) 334 U.S. 37, 68 S. Ct. 822, 92 L.Ed. 1196	9, 13, 18

Page

F.T.C. v. *National Lead Co.*, (1957) 352 U.S. 419, 77 S.Ct. 502, 1 L.E. 2d 438 13
F.T.C. v. *Standard Brands*, (2nd Cir., 1951) 189 F.2d 510 12
Gibson v. *Lockheed Aircraft Service*, 350 U.S. 356, 76 S.Ct. 366, 100 L.Ed. 395 ..... 17, 19
Harvey v. *Tyler*, (1865) 2 Wall. 328, 17 L.Ed. 871 17
Jacobs v. *Southern Ry. Co.*, (1916) 241 U.S. 229, 36 S.Ct. 588, 60 L.Ed. 970 17
Montgomery v. *Virginia Stage Lines*, (1951) 87 App. D.C. 327, 191 F.2d 770 19
Moore v. *Mead's Fine Bread Co.*, (1954) 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 123 13
Palmer v. *Hoffman*, (1943) 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 ..... 16, 18
Porto Rican American Tobacco Co. v. *American Tobacco Co.* (2nd. Cir., 1929) 30 F.2d 234 13
Samuel H. Moss, Inc. v. *F.T.C.*, (2nd Cir., 1945) 148 F.2d 378, cert. den. 326 U.S. 734, 66 S.Ct. 44, 90 L.Ed. 438 ..... 9, 11
Standard Oil Co. v. *F.T.C.* (1951) 340 U.S. 231, 71 S. Ct. 240, 95 L.Ed. 239 ..... 8, 12, 18
Sweeney v. *United Features Syndicate*, (2nd Cir., 1942) 129 F.2d 904 19
Swiderski v. *Moodenbaugh*, (9th Cir., 1944) 143 F.2d 212 19
Thomas v. *Union Ry. Co.*, (6th Cir., 1954) 216 F.2d 18 19
United States v. *General Motors Corp.*, (3rd Cir., 1955) 226 F.2d 745 19
Williams v. *Powers*, (6th Cir., 1943) 135 F. 2d 153 19
Wright v. *Farm Journal*, (2nd Cir., 1947) 158 F.2d 976 18

STATUTES

Clayton Act as amended by Robinson-Patman Act, § 2(a), 2(b), 38 Stat. 730, 49 Stat. 1526, 15 U.S.C. §§ 13(a), 13(b) 3, 7

MISCELLANEOUS

	Page
H.R. Rep. 627, 63rd Cong., 2d Sess. (1914)	13
H.R. Rep. 2287, 74th Cong., 2d Sess. (1936)	8, 13
Rule 19, Rules of the Supreme Court	14
Rule 38, Former Rules of the Supreme Court	16
Rule 46, Rules of Civil Procedure	19
Rule 51, Rules of Civil Procedure	2, 4, 16, 17, 19
Sen. Rep. 1502, 74th Cong., 2d Sess. (1936)	8, 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

THE ELGIN CORPORATION,

Petitioner,

v.

THE ATLAS BUILDING PRODUCTS CO.,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Elgin Corporation, prays that a writ of certiorari issue to review the final judgment of the Court of Appeals for the Tenth Circuit which affirmed the judgment of the District Court for the District of New Mexico in favor of respondent and against petitioner, a person aggrieved by respondent's violations of the anti-trust laws.

Opinion Below

The opinion of the Court of Appeals (Appendix p. 21) is reported at 251 F.2d 7. The District Court did not render an opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on January 11, 1958. A timely petition for rehearing was filed January 31, 1958, and was denied by order dated February 8, 1958. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented

1. Whether in a geographic price discrimination suit between manufacturers competing at the wholesale level it was error for the trial court to permit the jury, in ascertaining the presence or absence of the harmful effects on competition proscribed by the Clayton Act as amended by the Robinson-Patman Act, to consider the prices paid by the ultimate consumers of their respective products and the reasons given by purchasers for buying one product or the other.

2. Whether, in such a case, after a price differential has been established, the burden of proof is on the plaintiff to establish the existence of the harmful effects proscribed by the Act.

3. Whether a manufacturer subject to the Robinson-Patman Act must realize the same mill net return on sales of commodities of like grade and quality, especially in the absence of any other uniform system of pricing, an issue left undecided by the Court of Appeals although raised by objections to instructions.

4. What constitutes a sufficient objection to a trial court's instructions to the jury under Rule 51 of the Rules of Civil

Procedure, and whether the Court of Appeals, under the objections to instructions made by petitioner in this case, erred in refusing to decide:

(a) Whether to establish the defense of meeting the equally low price of a competitor in such a case, the discriminator must prove it knew its competitor's prices before cutting its own and that its competitor's prices were lawful;

(b) Whether the defense of meeting the equally low price of a competitor justifies geographic price cuts made to meet general competitive conditions or is limited to individual competitive situations;

(c) Whether, in a geographic price discrimination suit between competing sellers, the discriminatory sales, to be actionable, must have been made to competing purchasers.

Statute and Rule Involved

The statutes involved are Sections 2(a) and 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, 38 Stat. 730, 49 Stat. 1526, U.S.C. §§13(a) and 13(b), the pertinent portions of which are as follows:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be

substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:

* * * * * * *

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the *prime-facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Also involved is Rule 51 of the Rules of Civil Procedure, 28 U.S.C.A., the pertinent portion of which is as follows:

". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Statement of the Case

Issues presented by this appeal involve only pleadings, instructions to the jury, and instructions requested by

petitioner, so the record has been abbreviated by order of the Court of Appeals (R. 3). The following facts have been admitted by the pleadings or are contained in respondent's answers to interrogatories (R. 20-71).

Petitioner and respondent both are engaged in manufacture and sale of cinder concrete building blocks. The Elgin Corporation, plaintiff-petitioner (hereinafter called Elgin), manufactures its blocks at Silver City, New Mexico, and sells them at wholesale and retail wholly within the State of New Mexico. The Atlas Building Products Co., defendant-respondent (hereinafter called Atlas), manufactures its blocks at El Paso, Texas, and sells them at wholesale to dealers and contractors in Texas and New Mexico, some of its sales in New Mexico being in direct competition with Elgin. (R. 6, 7).

The principal products of the cinder concrete building block business are the 8″ x 8″ x 16″ "regular" blocks (R. 7, 8), and all references to prices are for these "regulars."

On January 4, 1956, Elgin filed suit for treble damages and an injunction, alleging price discriminations over a period commencing in 1948, (R. 6-9). In its original answer, Atlas denied discriminating in price, denied that the effect of any of its acts might be substantially to lessen competition or tend to create a monopoly as proscribed by the Act, and denied that Elgin had suffered damages for which it could recover a judgment. (R. 15-17). In an amended answer (Supp. R. 5, 8) Atlas added the defense of meeting the equally low price of a competitor but still "specifically denied" that it had discriminated in price.

However, in its pleadings and answers to the interrogatories Atlas listed prices to dealers and contractors in New Mexico which brought it a "mill net return" or f.o.b. plant price consistently lower than prices exacted from dealers and contractors in El Paso, Texas.

Atlas' prices to contractors do not appear with exactitude, the gist of its answers to allegations and interrogatories on this subject being that it bid on many jobs at prices that "varied from time to time and place to place." (R. 21).

Atlas' prices to dealers are set out in detail in four sets of answers to interrogatories (R. 20-71, 79). These prices are tabulated below without delivery charges:

	1947	1948	1949	1950	1951	1952	1953	1954	1955
El Paso	.1980	.1980	.1980	.2160	.2160	.2160	.2160	.2160	.2160
Silver City-Bayard	.1782	.1782	.1782 .1603	.16929 .18468	.18468	.18468	.1800	.1800	.1800
Lordsburg	.1980	.1782	.1782	.1944	.1944	.1944	.1944	.1944	.1944
Deming	.1980 .1800 .1782	.1782	.1782	.1782 .1944	.1944	.17496	.17496	.17496	.17496
Alamogordo	—	.1980	.1980	.2160	.2160	.2160 .1944	.1944	.1944	.1944
Las Cruces	.1980	.1980	.1980	.2160	.2160	.2160 .1700	.1700	.1700	.1700

At no time has Atlas received as high a mill net return from dealer sales in the Silver City-Bayard area as from its sales at El Paso, and since 1948 the same has been true for all the New Mexico points listed except Las Cruces and Alamogordo, which ceased to be the exceptions in 1952. No uniform pricing system is evidenced by these prices, even if delivery charges are added, and no such system is pleaded by Atlas.

In four different pleadings Atlas denied having knowledge of Elgin's prices before the commencement of this action (R. 10, 12, 16; Supp. R. 6).

On the ground that this lack of knowledge of its competitor's prices was fatally inconsistent with its defense of meeting the equally low price of a competitor, Elgin moved to strike this defense (R. 80, 81). This motion was denied (R. 83).

A trial was had in the District Court before a jury, which returned a verdict (R. 106) in favor of Atlas. From the

judgment (R. 106, 107) entered thereon, Elgin appealed (R. 107), and the Court of Appeals for the Tenth Circuit affirmed (Appendix, page 28).

Reasons for Granting the Writ

1. *This cause presents questions of major public importance under §§ 2(a) and 2(b) of the Clayton Act as amended by the Robinson-Patman Act, 38 Stat. 730, 49 Stat. 1526, 15 U. S. C. §§ 13(a), 13(b).*

The opinion of the Court of Appeals, while it erroneously left undecided even more important points than it resolved, made at least two grievous errors in the latter category which, if allowed to stand, will make it much more difficult for competing sellers to secure the protection from price discrimination intended by Congress.

First, ignoring the level of competition involved in a suit between manufacturers selling at wholesale, the Tenth Circuit impliedly approved (Appendix, page 26; 251 F.2d at p. 11) the instruction which permitted the jury, in determining whether the price discriminations had the harmful effects on competition proscribed by the Act, to consider

> "... the price paid by the *ultimate consumers* of Atlas block as compared to prices paid by ultimate consumers of Elgin block ... and the *reasons given by purchasers* for purchasing Atlas block or Elgin block. (R. 98; emphasis supplied).

In other words, the effect on *retail* prices was made a factor, whereas the parties competed only at *wholesale*, which amounts to saying that if a dealer or contractor who receives a discriminatory price does not pass the saving on to the "ultimate consumer" there is no harmful effect on competition or tendency toward monopoly. This ignores the harmful effect on competition that would result from

the loss of dealer outlets, the natural tendency of a dealer who continues to handle products of both parties to "push" the product of the discriminator, and the express intent of Congress to protect the competitor victimized by the discrimination rather than to require a showing of general injury to competition. H. R. Rep. 2287 and Sen. Rep. 1502, 74th Cong., 2d Sess.

In connection with the defense of meeting the equally low price of a competitor, but equally applicable to the "effect" provisions of the Act, this Court said in *Standard Oil Co.* v. *F.T.C.* (1951) 340 U.S. 231, 251, 71 S. Ct. 240, 250, 95 L.Ed. 239:

> "In the absence of more explicit requirements and more specific standards of comparison than we have here, it is difficult to see how an injury to competition at a level below that of the seller can thus be balanced fairly against a justification for meeting the competition at the seller's level."

E. Edelmann & Co. v. *F.T.C.* (7th Cir., 1956) 239 F.2d 152, 155, cert. den. (1958) —— U.S. ——, 78 S.Ct. 426, 2 L.E.2d 422, holds specifically that, to show effect on competition in such a case,

> "It is not necessary that a price advantage be used to lower the resale price and thereby attract business away from the nonfavored competitors. Sales are not the sole indicium that reflect the health of the competitive scene."

Likewise, the retrospective reasons of purchasers for buying as they did inject a foreign element into a price discrimination case. The purpose of such testimony, of course, might be to show that they were not influenced by price, or that the discriminator's product was superior, or that the

purchaser had some personal reason for buying from the discriminator. At most such testimony could show only that those particular purchasers were not potential customers of the competitor, but the corollary of this is that, as far as such purchasers were concerned, the discrimination was not necessary to get their business. It could have no possible relevance to the question of *effect*.

The second major stumbling block which the opinion puts in the way of suits by competing sellers is its holding that the burden of proof was on the plaintiff to establish the existence of the harmful effects proscribed by the amended Clayton Act. The trial court's instructions (R. 95-97) definitely placed this burden on the plaintiff, and the Tenth Circuit approved. (Appendix, page 25-26; 251 F.2d at p. 11).

This Court has held in effect that price discrimination is *per se* harmful to competition and that no proof to this effect need be introduced.

> "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers cheaper than they sell like goods to the competitors of these customers." *F.T.C.* v. *Morton Salt Co.*, (1948) 334 U.S. 37, 50, 68 S.Ct. 822, 830, 92 L.Ed. 1196.

In *Samuel H. Moss, Inc.* v. *F.T.C.* (2nd Cir., 1945) 148 F.2d 378, 379, cert. den. 326 U.S. 734, 66 S.Ct. 44, 90 L.Ed. 438, the burden definitely was placed on the discriminator to *negative* the presumption that such harmful effects may result.

This burden is less onerous to the discriminator than to his victim, but regardless of its onerousness it is no more

than right that it be borne by the discriminator. Any other rule would be a serious obstacle to enforcement of the Act, either by private suit or by the government.

The next error of the Court of Appeals was one of omission, for it completely ignored the important point of whether a manufacturer subject to the Robinson-Patman Act *must* realize the same mill net return on sales of commodities of like grade and quality, an issue raised by specific objections to instructions (R. 104). The objection was to the court's instruction that uniform mill net return is "sometimes" required (R. 97).

As shown by the prices tabulated in the Statement of the Case and in the Record (R. 20-71), Atlas had no zone delivered price system, no uniform delivered price system, nor any other pricing system which might be considered non-discriminatory. It pleaded none, but simply denied that its prices were discriminatory.

This Court has uniformly supported the mill net return pricing system in the three such cases that have come before it. *F.T.C.* v. *A. E. Staley Mfg. Co.*, (1945) 324 U.S. 746, 65 S.Ct. 971, 89 L.Ed. 1338; *Corn Products Refining Co.* v. *F.T.C.*, (1945) 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320; *F.T.C.* v. *Cement Institute*, (1948) 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010. These cases were followed in *American Can Co.* v. *Russellville Canning Co.* (8th Cir., 1951) 191 F.2d 38, and *Bond Crown & Cork Co.* v. *F.T.C.*, (4th Cir., 1949) 176 F.2d 974.

Uniform mill net return pricing is the only system that is discrimination-proof. It is particularly applicable to a low-price, heavy product like cinder concrete building blocks. Even if zone delivered or uniform delivered pricing might be tolerated on products where transportation costs are not a significant factor, nothing but mill net return pricing would fit the instant case.

We now come to the several points left undecided by the Tenth Circuit on the ground that objections to instructions were not made. Although this ground will be discussed later, it is necessary to mention the undecided points here because of their great public importance.

Included in this category are these vital questions concerning the defense of meeting the equally low price of a competitor: Whether the discrimininator must prove it *knew* its competitor's prices before cutting its own and that its competitor's prices were *lawful,* and whether it can justify *geographic* price cuts made to meet *general competitive conditions.*

Also, the Tenth Circuit declined to decide whether, in a geographic price discrimination suit between competing *sellers,* the discriminatory sales, to be actionable, must have been made to *competing purchasers.*

The importance of these points is so obvious, and the need of a clear-cut pronouncement by this Court is so great, that argument seems superfluous. Therefore, they will be summarized very briefly.

Knowledge of competitor's price: Whether a seller can "in good faith" meet the equally low price of a competitor whose prices he does not know is a question that has been clearly stated in only one reported case, *Samuel H. Moss, Inc.* v. *F.T.C.* (2nd Cir., 1945) 148 F.2d 378, cert. den. 326 U. S. 734, 66 S.Ct. 44, 90 L.Ed. 438, but there the court specifically reserved decision on this point. However, a month later this Court in effect answered the question in the affirmative in *F.T.C.* v. *A. E. Staley Mfg. Co.,* (1945) 324 U. S. 746, 65 S.Ct. 971, 89 L.Ed. 1338, where the burden of establishing this defense was held not to have been met where the discriminator acted on the basis of unverified reports of competitors' prices. (Due diligence, of course,

does not enter into a case unless the seller, acting on erroneous information as to his competitors' prices, has discriminated in price unintentionally, and no such issue is present in this case.) *Cf. F.T.C.* v. *Standard Brands,* (2nd Cir., 1951) 189 F.2d 510. Here, where the respondent four times pleaded lack of knowledge of petitioner's prices until suit was filed, the latter's prices should not have been an issue, and at the very least petitioner was entitled to an instruction on the necessity of such knowledge. Although the evidence is not before this Court, it is submitted that this is an essential instruction in *any* case where this defense is raised, and that it is one of the elements thereof which the discriminator must prove by a preponderance of the evidence.

Lawfulness of the price met: Since *Standard Oil Co.* v. *F.T.C.,* (1951) 340 U. S. 231, 71 S.Ct. 240, 95 L.Ed. 239, there should be no doubt that lawfulness of the competitor's price claimed to have been met is likewise an essential element of this affirmative defense which must be proved by the discriminator. On the margin of plaintiff's requested instruction on this point, the trial judge wrote a notation, "No evidence of unlawful sales" (R. 84), which indicates that he did not understand that the burden of proof rested on Atlas. In the absence of proof that the prices met were lawful, the defense fails entirely. But having submitted this issue to the jury, the trial court should have instructed that Atlas was entitled only to meet its competitors' prices which it had proved by a preponderance of the evidence were lawful.

Geographic price discrimination cannot be justified under the guise of meeting the equally low price of a competitor, yet the prices tabulated in the Statement of the Case show that Atlas' prices to dealers in the various communities were uniform within each community for the

time periods listed. It is limited to "individual competitive situations" as distinguised from "a general system of competition", *F.T.C.* v. *Cement Institute,* (1948) 333 U.S. 683, 725, 68 S. Ct. 793, 815, 92 L. Ed. 1010; *F.T.C.* v. *National Lead Co.,* (1957) 352 U.S. 419, 431, 77 S. Ct. 502, 510, 1 L.E. 2d. 438. Yet here we find the trial court permitting the jury to apply this defense to undefined "different competitive or other conditions" and saying that equally vague "Circumstances or certain conditions may justify a lower price in one area than is charged in another" (R. 97, 99). This carries us back to pre-Clayton Act days! See H. R. Rep. No. 627, 63d Cong., 2d Sess. (1914); Sen. Rep. No. 1502 and H. R. Rep. No. 2287, 74th Cong., 2d Sess. (1936); *F.T.C.* v. *Morton Salt Co.,* 334 U.S. 37, 48-50, 68 S. Ct. 822, 829, 830, 92 L. Ed. 1196; *E. Edelmann & Co.* v. *F.T.C.,* (7th Cir., 1956) 239 F. 2d 152, cert. den. (1958) —— U.S. ——, 78 S. Ct. 426, 2 L.E. 2d 422; *Anheuser Busch,* F.T.C. Dkt. 6331.

Competing purchasers requirement: This is perhaps the most important point of all. The trial court's instructions (R. 99) engraft upon § 2(a) of the amended Clayton Act a false requirement that, in a geographic price discrimination suit between *competing sellers* the purchasers from the discriminator must compete with each other and be in the *same area.* The court did say in the next breath that the purchasers need not be in *direct* competition, but beyond that the required degree of competition was never defined. If followed by other courts, this pseudorequirement would practically eliminate such suits between sellers, since the high-price "leg" of the discrimination is always across the state line. *Moore* v. *Mead's Fine Bread Co.,* (1954) 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 123; *Porto Rican American*

Tobacco Co. v. *American Tobacco Co.*, (2nd Cir., 1929) 30 F. 2d 234.

2. *The Tenth Circuit, in holding that petitioner did not bring the questions discussed in the preceding four paragraphs to the attention of the trial court by exceptions to instructions, "has so far departed from the accepted and usual course of judicial procedure . . . as to call for an exercise of this court's power of supervision," within the meaning of Rule 19(1) (b).*

It obviously is not true, as stated in the opinion (C.C.A. R. 12; 251 F. 2d at p. 11), that no such exceptions were saved. More than two pages of exceptions appear in the record (R. 102-104), and those applying to the questions presented are as follows:

> "II. That the Court instructed to the effect that the defendant could meet competition and that it could take into consideration in setting its pricing policy general competitive conditions, neither of which are in accordance with the law and are particularly repugnant to the provision regarding the defense of meeting the equally low price of a competitor.
>
> "III. That the Court instructed the jury that the sales, to be discriminatory, must be to 'different competing purchasers', which is not the law.
>
> "IV. That the charge of the Court put the burden of proof on the plaintiff as to the harmful effect of the price discrimination, whereas the burden of proof is on the defendant to negative the presumption that a harmful effect would result from such discrimination.
>
> "V. That the Court instructed the jury that in considering the effect of the price discrimination, if any, it might consider the price paid by the ultimate consumer and the reasons given by purchasers for

buying Atlas block, neither of which is permitted by the statute. And it being the contention of the plaintiff that the parties are in competition only on the wholesale level and only that level should be considered. • • •

"VII. The Court instructed the jury that the defendant could establish the defense of meeting the equally low price of a competitor without having required the defendant to show that it had knowledge of the competitor's prices at the time it established its own prices or that the plaintiff's or other competitors prices were lawful. And further, that the Court's instructions on this point failed to mention the geographical price discrimination theory. • • •

"By Mr. Blythe: One further point that I didn't mention and object of the Court's charge as given.

"The Court instructed in connection with the mill net return, that the seller is 'sometimes required to receive the same net mill return', whereas we think that they are required to in all instances. I believe that is all."

It should be noted here that the Tenth Circuit apparently lost sight of the fact that all of the points regarding the defense of meeting the equally low price of a competitor were covered by plaintiff's requested instructions (R. 83, 84) which were refused. Counsel for petitioner started to renew exceptions to their refusal after the charge to the jury, but was stopped by the court in a colloquy which follows (R. 104):

"Excuse me Your Honor. I am supposed to be objecting to the instructions as made by the Court and not as requested by the plaintiff; is that so?

"By the Court: Yes.

"By Mr. Blythe: Well, then I reserve the rest of my exceptions unless you want me to proceed at this time to except to the failure to give certain of the plaintiff's instructions.

"By The Court: Well, I was going to say, and I will to each counsel, the plaintiff and the defendant, each submitted requested instructions, all of which have been refused by the Court with the exception as to such parts of them may have been included in the general charge. And, of course, counsel excepts to the refusal of the Court to give their several respected requested instructions, which I will file with the reporter. I think that takes care of the record on that."

According to *City of Knoxville* v. *Bailey,* (6th Cir., 1955) 222 F. 2d 520, 529, where a similar situation arose, these errors were available on appeal without such formal renewal of exceptions.

Perhaps the Tenth Circuit meant to say that no *sufficient* exceptions were made, but those referred to stand all tests laid down by this Court, both under old Rule 38 of this Court and under the present Rule 51 of the Rules of Civil Procedure.

This problem has come up in this Court many times over the years, the latest decision on the point being *Palmer* v. *Hoffman,* (1943) 318 U.S. 109, 119, 63 S. Ct. 477, 483, 87 L. Ed. 645 where the standard was laid down that

". . . objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."

This is not to say that a point of law objected to must be spelled out in great detail, a practical impossibility

under trial conditions with the jury waiting to began deliberations.

The question generally has arisen in this Court when general exceptions were made to a whole charge. Under such conditions this Court has said in slightly varying language that the objection must call attention to the "precise point" (*Harvey* v. *Tyler,* [1865] 2 Wall. 328, 338, 339, 17 L. Ed. 871), "particular portions" (*Burton* v. *West Jersey Ferry Co.,* [1885] 114 U.S. 474, 476, 5 S. Ct. 960, 961, 29 L. Ed. 215), "specific portion" or "specific propositions" (*Beckwith* v. *Bean,* [1879] 98 U.S. 266, 25 L. Ed. 124) deemed objectionable. These and many other cases that could be cited indicate that it may be sufficient to call the court's attention to the subject matter of the charge objected to where it is intended to object to the whole charge on that topic; but where, as in *Jacobs* v. *Southern Ry. Co.,* (1916) 241 U.S. 229, 236, 36 S. Ct. 588, 592, 60 L. Ed. 970, only one phase of an instruction on a subject is objectionable the objection should pinpoint that phase.

It is submitted that the objections in this case meet all these standards and that the Tenth Circuit should be required to decide the points raised thereby—unless, of course, it is deemed desirable to decide them here due to their public importance.

In *Gibson* v. *Lockheed Aircraft Service,* 350 U.S. 356, 76 S. Ct. 366, 100 L. Ed. 395 (No. 42, Oct. term 1955) certiorari was granted in part to determine sufficiency of an objection under Rule 51, but the decision went off on other grounds. As ably pointed out in the briefs in that case, a wide divergence exists in the practice of the various circuits on this point, and the instant case gives this Court another opportunity to give the bench and her badly needed guidance.

3. The Court of Appeals has rendered a decision which is in conflict with decisions of other courts of appeals in the same matters and has decided federal questions in a way in conflict with applicable decisions of this Court.

These conflicts have been pointed out already, so they will be listed briefly here:

Its holding that prices paid by "ultimate consumers" could be considered by the jury in determining whether the price differentials might have a harmful effect on competition certainly is inconsistent if not in direct conflict with *Standard Oil Co.* v. *F.T.C.*, (1951) 340 U.S. 231, 251, 71 S.Ct. 240, 95 L.Ed. 239, and *E. Edelmann & Co.* v. *F.T.C.*, (7th Cir., 1956) 239 F.2d 152, 155, cert. den. (1958) —— U.S. ——, 78 S.Ct. 426, 2 L.Ed. 2d 422.

Its holding that the burden of proof was on the plaintiff to prove "the presence or absence of the effects proscribed by the Clayton Act, as amended" (CCA R. 12-14; 251 F.2d at p. 11) is in conflict with this Court's holding in *F.T.C.* v. *Morton Salt Co.*, (1948) 334 U.S. 37, 50, 68, S.Ct. 822, 830, 92 L.Ed. 1196, that the "reasonable possibility" of such effects is "self-evident" without any testimony, which amounts to a presumption that such harmful effects may result from price differentials.

Its holding that several questions were "not brought to the attention of the trial court by exceptions to the instructions" (CCA R. 12; 251 F.2d at p. 11), if interpreted as meaning that the exceptions made were *insufficient*, is in direct conflict with several decisions of this Court cited above, including *Palmer* v. *Hoffman*, (1943) 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, and with the following decisions among many others that could be cited from the courts of appeals:

Second Circuit: *Wright* v. *Farm Journal* (1947) 158 F.2d

976; *Sweeney* v. *United Features Syndicate,* (1942) 129 F.2d 904, 905.

Third Circuit: *United States* v. *General Motors Corp.,* (1955) 226 F.2d 745, 750; *Alcaro* v. *Jean Jordeau, Inc.,* (1943) 138 F.2d 767, 771.

Sixth Circuit: *City of Knoxville* v. *Bailey,* (1955) 222 F.2d 520, 529; *Thomas* v. *Union Railway Co.,* (1954) 216 F.2d 18, 20; *Williams* v. *Powers,* (1943) 135 F.2d 153, 156; *Evansville Container Corp.* v. *McDonald,* (1942) 132 F.2d 80, 84.

Ninth Circuit: *Swiderski* v. *Moodenbaugh,* (1944) 143 F.2d 212.

Appeals D.C.: *Montgomery* v. *Virginia Stage Lines,* (1951) 87 App. D.C. 327, 191 F.2d 770, 773, 774.

Without attempting to analyze these cases individually, due to the space required, we believe a fair summary of them is that Rules 46 and 51 should be read together to mean that technical perfection of objections to instructions should not be required (*Wright* v. *Farm Journal*; *United States* v. *General Motors Corp.*; *Williams* v. *Powers*; *Evansville Container Corp.* v. *McDonald*; and *Montgomery* v. *Virginia Stage Lines, supra*); that factors which can be considered in aid of an imperfect objection, to show that the court was aware of the objector's position, include an objection made before the charge and not repeated afterwards (*Evansville Container Corp.* v. *McDonald*), affidavits of counsel that the court and opposing counsel were so informed in informal conference (*Sweeney* v. *United Features Syndicate*), and a pre-trial conference order (*Swiderski* v. *Moodenbaugh*). Also, objections to failure to give requested instructions need not be repeated after the charge where the judge says it is not necessary (as in this case—see p. 104 of Record); *City of Knoxville* v. *Bailey.*

This honorable Court is respectfully referred to the briefs in *Gibson* v. *Lockheed Aircraft Service,* 350 U.S. 356,

76 S.Ct. 366, 100 L.Ed. 395 (No. 42, Oct. term 1955), for numerous other citations applicable to this case.

Conclusion

Manifestly, the issues in the case at bar are of widespread public importance, involving as they do fundamental questions of anti-trust law. Some of them were decided by the Court below in contravention of Sections 2(a) and 2(b) of the amended Clayton Act and in conflict with decisions of this Court and other courts of appeals. Even more of them were left undecided by a departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision. It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

April 29, 1958.

DEE C. BLYTHE,
Counsel for Petitioner.

HUBERT O. ROBERTSON,
Of Counsel.

OPINION

(January 11, 1958)

Dee C. Blythe (Hubert O. Robertson was with him on the brief) for Appellant.

W. A. Sloan and John P. Eastham (Scott, Hulse, Marshall & Fueille and Rodey, Dickason, Sloan, Akin & Robb were with them on the brief) for Appellee.

Before BRATTON, Chief Judge, and HUXMAN and BREITENSTEIN, Circuit Judges.

BRATTON, Chief Judge.

Invoking pertinent provisions of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, The Elgin Corporation instituted this action against The Atlas Building Products Company to recover damages for alleged price discrimination in the sale of concrete cinder building blocks, and also to obtain injunctive relief to prevent future discrimination of that kind. It was alleged in the complaint that plaintiff was a corporation organized under the laws of New Mexico; that its principal place of business was at Silver City, New Mexico; that it was engaged in the manufacture and sale at wholesale and retail of concrete cinder building blocks and related building materials wholly within New Mexico; that the defendant was a corporation organized under the laws of Texas; that its principal place of business was at El Paso, Texas; that it was engaged in the manufacture and sale at wholesale of concrete cinder building blocks; that it manufactured such blocks at El Paso and sold them to dealers and builders in both Texas and New Mexico; and that the sales to purchasers in New Mexico were made in the course of interstate commerce and in direct competition with plaintiff. It was further alleged that commencing in 1948 and continuing to the time of the institution of the action in 1956, defendant in the course of its business in interstate commerce had sold and was continuing to sell blocks in New Mexico to dealers and contractors at prices

lower actually, or lower by reason of discounts and rebates, than those exacted for its products of like grade and quality from purchasers in Texas; that the practice constituted price discrimination; and that the effect of such price discrimination might be substantially to lessen competition or tend to create a monopoly in a line of commerce, or to injure, destroy, or prevent competition by plaintiff with persons who received the benefits of such discrimination, or with customers of either of them. It was further alleged that commencing in 1948 and continuing to the time of the institution of the action, defendant in the course of interstate commerce had systematically sold and was continuing systematically to sell blocks in New Mexico to dealers and contractors at prices lower actually, or lower by reason of discounts and rebates, than those exacted by the defendant for products of like grade and quality elsewhere in the United States for the purpose of destroying competition and eliminating competitors, particularly plaintiff. And it was further pleaded that the defendant sold blocks manufactured at El Paso to dealers in New Mexico at varying base prices, less varying discounts, plus charges for freight which were less than actual cost of such freight; that the defendant absorbed part of the freight charges, thus resulting in further discrimination in the delivered price of the products; that the defendant adhered to no base price in bidding on contracts with building contractors in New Mexico but consistently underbid all other bidders, including plaintiff, by any amount necessary to get such contracts; that the prices exacted by the defendant in New Mexico frequently were below the cost of production plus transportation; that such prices were unreasonably low and were made for the purpose of destroying competition and eliminating competitors, particularly plaintiff; that such prices constituted price discrimination; and that the effect of such price discrimination might be substantially to lessen competition or tend to create a monopoly in a line of commerce, or to injure, destroy, or prevent competition by plaintiff with defendant and with persons who received the benefit of such discrimination, or with customers of either of them. The defendant denied discriminating in

prices; denied that plaintiff had suffered damages resulting from illegal acts and practices on the part of defendant; pleaded good faith in meeting the equally low price of a competitor; and pleaded limitation. The cause was tried to a jury. The jury returned a verdict for defendant. Judgment was entered upon the verdict; plaintiff appealed; and for convenience, continued reference will be made to the parties as plaintiff and defendant, respectively.

Error is predicated upon the action of the court in denying the motion to strike from the amended answer the defense of good faith in meeting the equally low price of a competitor. The substance of the defense pleaded was that if the defendant had discriminated, which was specifically denied, such discrimination was made in good faith to meet the equally low price of a competitor. It is argued that the defense was not only inconsistent with other defenses raised in the amended answer and with various affidavits and answers to interrogatories filed in the case, but was inconsistent within itself. In presently pertinent part, Rule of Civil Procedure 8(e)(2), 28 U.S.C.A., provides that a party may state as many separate defenses as he has regardless of inconsistency. It is clear that under the sweep of the rule, defendant was at liberty to plead the defense of good faith in meeting the equally low price of a competitor, even though it may have been inconsistent with other defenses raised and with various affidavits and interrogatories filed in the case. Southwestern Packing Co. v. Cincinnati Butchers' Supply Co., 139 F. (2d) 201; M. Snower & Co. v. United States, 140 F. (2d) 367; Fidelity & Deposit Co. of Maryland v. Krout, 146 F. (2d) 531; Washington Annapolis Hotel Co. v. Riddle, 171 F. (2d) 732. And it is further argued that the defense was interposed so late that plaintiff had to go to trial without an opportunity to prepare to meet the issue. The defense was not pleaded in the original answer. It was first tendered in the amended answer filed four days before the trial of the case. But in connection with oral argument at a hearing upon other matters soon after the institution of the action, defendant requested and was granted leave to amend

its answer to raise the defense. And at a pre-trial conference held more than a month prior to the trial of the case, defendant again requested and again was granted leave to amend its answer to tender the issue. But in neither instance was an order entered formally granting leave to amend. After leave to amend had been twice informally granted and almost a month prior to the trial of the case, plaintiff submitted further interrogatories to be answered by defendant. Some of such interrogatories pertained to the defense of meeting an equally low price of a competitor. These were answered but plaintiff says that the answers were evasive and insufficient. It is manifest however that plaintiff was on notice long in advance of the trial that the issue of good faith in meeting the equally low price of a competitor would be tendered and that plaintiff had sufficient time in advance within which to prepare for trial upon it. And moreover, after the motion to strike had been denied, no effort was made to obtain additional time within which to prepare for trial. Instead, plaintiff went voluntarily to trial upon the case at large. We think that the motion to strike was not well founded and that its denial did not constitute error.

The instructions given to the jury are subjected to challenge in respect to correctness and sufficiency. It is argued that the court in its instructions failed to define the word or term "monopoly" or to provide a standard for applying it. It is further argued that the court used the verbiage "meet competition", "different competitive or other conditions", and "circumstances or certain conditions may justify a lower price in one area than is charged in another"; that such verbiage was not defined in any way; that it was contrary to law; that it was in conflict with the instructions upon the meeting of the equally low price of a competitor; and that it could not have failed to confuse the jury. It is further argued that the court improperly defined price discrimination, using permissive rather than mandatory language. It is further argued that the court erred in instructing the jury that

it "had the right" to consider any difference in prices exacted by defendant at El Paso and those exacted in New Mexico, rather than making such consideration mandatory. It is further argued that the instructions were defective and deficient in failing to include certain essential elements of the defense of good faith in meeting the equally low price of a competitor. It is further argued that in a geographic price discrimination suit between competing sellers, the law does not require that discriminatory sales to be actionable must have been made to competing purchasers in the same area, and that the instructions to that effect were erroneous. It is further argued that the instructions were erroneous in that they required plaintiff to prove a causal connection between defendant's discrimination in prices and plaintiff's injury as the result thereof. And it is further argued that the four-year statute of limitations in New Mexico was applicable to this case; that acts of price discrimination which occurred more than four years before the commencement of the action but not discovered by plaintiff until within the four-year period were actionable; and that the instructions erroneously limited recovery of damages to the period of four years preceding the filing of the complaint. No exceptions were directed to the instructions upon these grounds, respectively. And it is held without deviation that in ordinary circumstances a question relating to the correctness or sufficiency of instructions is not open to review on appeal unless the matter was brought to the attention of the trial court by exception or in some other appropriate manner. Smith v. Welch, 189 F. (2d) 832; R. Olsen Oil Co. v. Fidler, 199 F. (2d) 868; Atchison, Topeka & Santa Fe Railway Co. v. Andrews, 211 F. (2d) 264; White Auto Stores v. Reyes, 223 F. (2d) 298; Nephi Processing Plant v. Talbott, 247 F. (2d) 771. These questions not having been brought to the attention of the trial court by exceptions to the instructions, they are not open to review on appeal.

A further ground of attack upon the instructions given to the jury is that the burden of proof was erroneously placed upon plaintiff to establish the effect of defendant's

price discrimination upon plaintiff and permitted the jury to consider the prices paid by ultimate consumers and their reasons for purchasing defendant's products instead of plaintiff's in determining the presence or absence of the effects proscribed by the Clayton Act, as amended. The substance of the instructions to which the attack is directed was that the price discrimination charged in the complaint must be established by a preponderance of the evidence and must be sufficient to warrant the reasonable and logical inference therefrom that the price discrimination was such that it might lessen competition, or tend to create a monopoly, or to injure, destroy, or prevent competition, with any person who received or benefited therefrom, or with customers of either of them; that the evidence did not have to establish that a monopoly actually occurred; that it was sufficient if there was a reasonable possibility that unlawful acts of the defendant tended to create a monopoly; and that although price discrimination with reasonable possibility of producing harmful effects must have been established by the evidence, it was not necessary to prove that the defendant intended to discriminate in price to the extent and in a manner that would constitute a violation of law by causing or tending to cause the harmful effects mentioned. The Clayton Act, as amended, does not have the effect of making any and every differential in price in various areas illegal price discrimination within the intent and meaning of the Act. The Act concerns itself with price discrimination which is reasonably calculated to lessen competition, or tends to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of discrimination of that kind, or with customers of both of them. Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726; Chicago Sugar Co. v. American Sugar Refining Co., 176 F.(2d) 1, certiorari denied, 338 U. S. 948. And the burden rested upon plaintiff to establish price discrimination of that kind and character. Balian Ice Cream Co. v. Arden Farms Co., 231 F.(2d) 356, certiorari denied, 350 U.S. 991. We have no difficulty in reaching the conclusion that the portions of the instructions now challenged,

considered in their entirety, constituted a correct exposition of the applicable principles of law with respect to the burden of proof to establish a prima facie case of price discrimination.

The refusal of the court to give a requested instruction relating to limitations is assigned as error. The suit was instituted January 4, 1956. Making application of the law of New Mexico respecting limitations, the substance of the requested instruction was that if the issues were decided in favor of plaintiff, the jury might award damages accruing between January 5, 1952, and the time of the return of the verdict; and further, that if the jury found from the evidence that there were acts of price discrimination which occurred prior to January 5, 1952, but were not discovered by plaintiff until after that period began to run, damages could be awarded for injuries resulting therefrom. The crux of the instruction upon which emphasis is placed was that in addition to recovering damages which accrued during the four-year period preceding the institution of the suit, plaintiff was entitled to recover damages for acts of price discrimination occurring prior to that time but not discovered by plaintiff until some time during such period. Whether price discrimination occurred prior to the beginning of the four-year period but was not discovered until some time during such period was a question of fact. The evidence in the case was not brought to this court as a part of the record. It is not before us. And in the absence of the evidence, it cannot be said that the requested instruction was pertinent or was susceptible of adaptation to the proof.

Another contention is that the court erred in refusing to give a requested instruction in respect to returning a verdict for plaintiff for nominal damages. The court instructed the jury in conventional language concerning the return of a verdict for actual or compensatory damages. Plaintiff submitted a requested instruction charging in substance that if the issues were found in favor of plaintiff, the jury must return a verdict of at least nominal damage of $1.00, and that the maximum amount for which a verdict could be returned was $75,000. Of course, instructions re-

lating to damages should be given or denied in the light of the facts in the particular case. It may be that if the evidence adduced upon the trial disclosed illegal price discrimination on the part of defendant but failed to show substantial damage to plaintiff as the result of such wrong, the jury should have been instructed that in those circumstances a verdict should be returned for nominal damages. But we do not explore that field. Instead, we pretermit doing so until an appropriate occasion presents itself. For present purposes, it is enough to say again that the evidence is not before us, and that in the absence of the evidence it cannot be said that the refusal to give the requested instruction constituted error.

Other contentions are advanced for reversal of the judgment, but we think that they are without substance and do not merit discussion.

The judgment is AFFIRMED.

JUDGMENT

Sixth Day, January Term, Saturday, January 11th, 1958.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
JUN 6 1958
JOHN T. FEY, Clerk

No. 988

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE ELGIN CORPORATION,

Petitioner,

vs.

THE ATLAS BUILDING PRODUCTS CO., a corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

WILLIAM A. SLOAN
Attorney at Law
First National Bank Building
Albuquerque, New Mexico

J. F. HULSE
Attorney at Law
First National Building
El Paso. Texas

Attorneys for Respondent

SCOTT, HULSE, MARSHALL & FEUILLE
El Paso, Texas

JOHN P. EASTHAM and
RODEY, DICKASON, SLOAN, AKIN & ROBB
Albuquerque, New Mexico

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	4
POINT I. IN THE ABSENCE OF ANY EVIDENCE IN THE RECORD, THIS COURT CANNOT POSSIBLY DETERMINE WHETHER THERE ARE ANY QUESTIONS OF MAJOR PUBLIC IMPORTANCE RAISED IN THIS CASE	4
A. Level of Competition	7
B. Burden of Proving Harmful Effects	8
C. Mill Net Return	9
D. Knowledge of Competitor's Price	10
E. Lawfulness of the Price Met	10
F. Geographic Price Discrimination	10
G. Competing Purchasers Requirement	11
POINT II. THE COURT OF APPEALS FOR THE TENTH CIRCUIT CORRECTLY REFUSED TO RULE ON CERTAIN PURPORTED OBJECTIONS TO INSTRUCTIONS	11
POINT III. THE OPINION OF THE COURT BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS IN THE SAME MATTERS NOR IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT	12
CONCLUSION	13

TABLE OF AUTHORITIES

PAGE

CASES

Automatic Canteen Co. v. Federal Trade Commission, 346 U. S. 61, 97 L. Ed. 1454 (1953) 8

Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356 (9th Cir. 1955), *cert. denied*, 350 U. S. 991, 100 L. Ed. 856 (1956) 8, 9, 11

Boley v. Griswold, 87 U. S. 486, 22 L. Ed. 375 (1874) 6

Chicago Sugar Co. v. American Sugar Refining Co., 176 F. 2d 1 (7th Cir. 1949), *cert. denied*, 388 U. S. 948, 94 L. Ed. 584 (1950) 11

Coffee v. Planters Bank, 54 U. S. 183, 14 L. Ed. 105 (1851) 6

Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726, 89 L. Ed. 1320 (1945) 9

The Elgin Corporation v. The Atlas Building Products Company, 251 F. 2d 7 (1958) 8

Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U. S. 746, 89 L. Ed. 1338 (1945) 10

Federal Trade Commission v. Standard Oil Company, 355 U. S. 396, 2 L. Ed. 2d 359 (1958) 8

General Foods Corporation, F. T. C. Docket 5675 (1954) 8

Jones v. Buckell, 104 U. S. 554 ,26 L. Ed. 841 (1882) 5

Klein v. The Lionel Corp., 138 F. Supp. 560 (D. Del. 1956), *affirmed*, 237 F. 2d 13 (3d Cir. 1956) 11

PAGE

Mays v. Fritton, 87 U. S. 414, 22 L. Ed. 389 (1874) 6

National Lead Company, 49 F. T. C. 791 (1953) 9

New York, Lake Erie and Western R. R. Co. v. Madison, 123 U. S. 524, 31 L. Ed. 258 (1887) 5

Phoenix Mutual Life Ins. Co. v. Raddin, 120 U. S. 183, 30 L. Ed. 644 (1887) 6

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U. S. 70, 99 L. Ed. 897 (1955) 4

Samuel H. Moss, Inc. v. Federal Trade Commission, 148 F. 2d 378 (2d Cir. 1945) 8

Settlemier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110 (1879) 6

Standard Oil Co. v. Brown, 238 F. 2d 54 (5th Cir. 1956) 10

Worthington v. Mason, 101 U. S. 149, 25 L. Ed. 848 (1880) 6

STATUTES AND RULES

15 U.S.C.A., Sec. 13(a) 3, 8, 11

15 U.S.C.A., Sec. 13 a 11

Supreme Court Rule 19 (1) (b) 12

PAGE

MISCELLANEOUS

Congressional Record, 1936 11

5 C.J.S., Appeal and Error, Sec. 1560 7

House Report 2287, 74th Cong., Second Session 11

Simon, *Geographic Pricing Policies* (Callaghan & Co., 1950) 9

No. 988

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE ELGIN CORPORATION,

Petitioner,

vs.

THE ATLAS BUILDING PRODUCTS CO., a corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The respondent has no objection to the portions of the Petition entitled "Opinion Below", "Jurisdiction" and "Statute and Rule Involved" (Pet., pp. 2, 3). The respondent is dissatisfied with the petitioner's "Questions Presented" and Statement of the Case".

QUESTIONS PRESENTED

The sole question presented by this Petition for Writ of Certiorari is whether this Court will review a case in which the Court of Appeals affirmed a jury verdict in favor of the respondent, where no evidence taken at the trial of the case is contained in the record on appeal, and where the only error on the part of the trial court claimed before this Court relates to the giving of certain instructions by the trial court and the refusal by the trial court to give certain of the requested instructions of the petitioner.

STATEMENT OF THE CASE

Respondent's major objection to petitioner's Statement of the Case is that it purports to give a statement of facts by the assertion that certain facts were admitted by the pleadings or were contained in respondent's Answers to Interrogatories (Pet. 5). This simply is not true as there were *no* evidentiary facts before the Court of Appeals and there are *no* evidentiary facts before this Court. The petitioner, for reasons of its own, and over the strong protest of respondent, chose to take this appeal with no evidence in the record and hence no facts. Having made this choice and having obtained over the objection of respondent an order from the Court of Appeals allowing diminution of the record, petioner is in no position to object that this Court is being called upon to decide whether to grant certiorari in the vacuum created by the absence of facts. It is not correct to state that allegations in pleadings constitute facts. Pleadings make issues but are not introduced in evidence before the Jury, and aside from making issues serve no additional purpose. Petitioner's attempt to use the Answers to Interrogatories as "facts" constitutes a violation of the Order of

the Court of Appeals which allowed a diminution of the record, since as to such Answers this order reads: " . . . . the same shall be included in the record on appeal, but only for the purpose of enabling this Court to review the action of the District Court in denying the plaintiff's Amended Motion to Strike which is stated as the first Point of Appellant's First Amended Statement of Points." (R. 4).

Petitioner's attempt on pages 5 and 6 of its Petition for Writ of Certiorari to use such Answers as the "facts" in the case is therefore completely unjustified. The actual facts in the case were extremely favorable to the respondent, which may be the reason the petitioner wished to take this appeal without the facts.

The only fair statement of this case would be as follows:

1) Petitioner on January 4, 1956, filed suit for treble damages and an injunction, pleading alleged violations by respondent of 15 U.S.C.A., Sec. 13(a), which alleged violations had damaged petitioner (R. 6-9).

)2 Respondent by answer denied any violation of 15 U.S.C.A., Sec. 13(a), denied any damages and set up the affirmative defenses of the Statute of Limitations and of the good faith meeting of the equally low price of a competitor (R. 15-17, S.R. 5-8).

3) Petitioner moved to strike the defense of the good faith meeting of the equally low price of a competitor (R. 81-83) and the Court denied this motion (R. 83).

4) The case was tried before a jury, which after being instructed by the Court, returned a general verdict in favor of respondent (R. 106). Judgment was entered in favor of respondent and the request for an injunction was denied (R. 106).

5) Petitioner made a timely appeal from this judgment (R. 107, 112).

It is on the above skeleton that the petitoner has chosen to bring this appeal before the Circuit Court of Appeals and to bring this Petition for Writ of Certiorari to this Court.

ARGUMENT

PONIT I. IN THE ABSENCE OF ANY EVIDENCE IN THE RECORD, THIS COURT CANNOT POSSIBLY DETERMINE WHETHER THERE ARE ANY QUESTIONS OF MAJOR PUBLIC IMPORTANCE RAISED IN THIS CASE.

It is well settled that this Court will not grant Certiorari in order to argue legal principles in a vacuum. As so aptly stated by Mr. Justice Frankfurter in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74, 99 L. Ed. 897, 901 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

In the instant case, if the Court did grant certiorari it could do nothing more than discuss certain nebulous legal doctrines surrounding the Clayton Act and the Robinson-Patman Act, since there is a complete absence of any facts on which to ground such discussion. Petitioner appar-

ently claims that these issues under the Clayton Act and Robinson-Patman Act are raised by certain of the Court's Instructions and by certain of petitioner's Requested Instructions, which were not granted by the Court. Without any evidence in the record, however, instructions given or refused simply raise abstract propositions of law. As stated by this Court in *Jones v. Buckell,* 104 U. S. 554, 556, 26 L. Ed. 841, 842 (1882):

> "But with no issue made directly by the pleadings, and no evidence set forth or referred to in the bill of exceptions showing the materiality of the charge complained of, the case presents to us only an abstract proposition of law which may or may not have been stated by the court in a way to be injurious to the plaintiffs in error."

Mr. Chief Justice Waite summed up this rule of law succinctly in *New York, Lake Erie and Western R. R. Co. v. Madison,* 123 U. S. 524, 526, 31 L. Ed. 258, 260 (1887) as follows:

> "No part of the evidence, save that which was excepted to, is set out in the bill of exceptions, and there is no such statement of the facts proven as will enable us to see that the charge as given or refused had any reference to the case as it appeared at the trial. The record as it comes to us presents only abstract questions of law, which may or may not have been ruled in a way to affect the defendant injuriously. It has long been settled that such questions will not be considered here on a writ of error unless it appears from the bill of exceptions, or otherwise in the record, that the facts were such as to make them material to the issue which was tried."

See also *Phoenix Mutual Life Ins. Co. v. Raddin*, 120 U. S. 183, 193-196, 30 L. Ed. 644, 647-649 (1887). It is also well settled in this Court that in the absence of a record containing an affirmative showing of error, it will be presumed that the judgment of the trial court is correct; *Coffee v. Planters Bank*, 54 U. S. 183, 14 L. Ed. 105 (1851); *Boley v. Griswold*, 87 U. S. 486, 22 L. Ed. 375 (1874); *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110 (1879); and where there is no evidence in the record, it will be presumed that the evidence supports the verdict and the judgment. *Mays v. Fritton*, 87 U. S. 414, 22 L. Ed. 389 (1874). From the fact that all of the above-cited cases were decided before 1900 and from the fact that there have been no similar cases since that date, it is apparent that before the turn of the century this Court took cases with an insufficient record and summarily affirmed, while since the turn of the century this Court has simply refused to consider cases with an insufficient record.

Two final general doctrines of law cement the futility of this petition. In the first place, this Court has made it clear in discussing requested instructions that the entire requested charge must be correct, or else the Trial Court is justified in refusing to give the charge. The Court has no duty to do anything more than pass upon the request in its entirety. *Worthington v. Mason*, 101 U. S. 149, 25 L. Ed. 848 (1880). Since a requested instruction is not correct if it does not have any foundation in the facts of the case, obviously the validity of requested instructions cannot be passed upon in the absence of the evidence. A perfect illustration of this obvious rule is shown by petitioner's requested instruction No. 5 (R. 83-84), the first paragraph of which brings out the issue of the lawfulness of the price which the seller is meeting in good faith. The trial judge, Judge Hatch, made a handwritten notation on the original request "No

evidence of unlawful sales" (R. 84), thus pointing out that this requested instruction in its entirety was properly refused.

Finally, the general rule relating to requested instructions is that where requested instructions are refused it must be presumed that they were refused for lack of supporting evidence where, as here, the record does not contain the evidence. 5 C.J.S., Appeal and Error, Sec. 1560, pp. 1208-1209.

In summary, therefore, we are faced with a situation where this Court could not conclude that the Trial Court was in error even if all of the abstract legal principles of the petitioner were correct, which they are not. The burden is on petitioner to show prejudicial error, and this it cannot do without the evidence. Under these circumstances this Court certainly should not grant certiorari.

Thus since it is clear that the petition for a writ of certiorari should be denied because of the lack of a proper record, we will give the contentions of the petitioner only a very brief discussion.

A. *Level of Competition*

Without the facts in the record on appeal, it would be impossible for this Court to ascertain if the instructions given by the trial court on this topic were correct or not. Petitioner in its discussion under this point assumes that the parties competed only at the wholesale level. The evidence actually showed that most of the respondent's sales in the Silver City area were to dealers who in turn sold them either to contractors or at retail, the largest volume being sold to contractors, and that the competition which Atlas block had to meet were sales or bids made directly by the petitioner to contractors. Thus the factual assump-

tion of petitioner is incorrect. Moreover, the law is well established that there may be different levels in the sales of a product. See *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F. 2d 356, 363 (9th Cir. 1955), *cert. denied*, 350 U. S. 991, 100 L. Ed. 856, (1956); *Federal Trade Commission v. Standard Oil Company*, 355 U. S. 396, 2 L. Ed. 2d 359 (1958).

B. *Burden of Proving Harmful Effects*

The instructions complained of under this argument of petitioner merely placed the burden of proof on petitioner to prove a price discrimination within the meaning of 15 U. S. C. A., Section 13(a). Petitioner's position apparently is that if it proved a price differential, then the burden was on respondent to prove that such differential was not a price discrimination. But as said by the Court of Appeals in this case, it is not every price differential which is a discrimination. *The Elgin Corporation v. The Atlas Building Products Company*, 251 F. 2d 7, 11 (1958). A price differential certainly is not price discrimination within the prohibition of Section 13(a) unless the differential may have the proscribed effects therein set forth, and as to all of this the petitioner has the burden of proof. This Court has decided in the case of *Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 78, 97 L. Ed. 1454, 1466 (1953) that Congress did not intend to make a defendant disprove a tendency to injure competition. It is significant that the case relied upon by petitioner to support this doctrine of shifting the burden of proof, *Samuel H. Moss, Inc. v. Federal Trade Commission*, 148 F. 2d 378 (2d Cir. 1945) was repudiated by the Federal Trade Commission because of the *Automatic Canteen* case in its *General Foods Corporation* case decided in 1954 as F. T. C. Docket 5675. Thus

the Federal Trade Commission now requires the complaining party to prove the harmful effects.

C. *Mill Net Return*

The statement by petitioner that a seller must realize the same mill net return on sales of commodities in every area served has absolutely no basis in the statute or the cases. The history of the Robinson-Patman Act is set out in a book written by William Simon, formerly general counsel of the Senate Interstate and Foreign Commerce Committee, Subcommittee on Trade Policies, entitled *Geographic Pricing Policies* (Callaghan & Co., 1950). The author points out at pages 62 and 66 that the legislative history is conclusive that the bill as passed contained no uniform mill net return requirement. In fact, if a definition of "price" which would have required a uniform mill net return had not been stricken from the bill, it never would have received a favorable vote of the Committee. This legislative history is also detailed by Mr. Chief Justice Stone in *Corn Products Refining Co. v. Federal Trade Commission,* 324 U. S. 726, 737, 89 L. Ed. 1320, 1331 (1945). The Federal Trade Commission ended its dalliance with this theory in the case of *National Lead Company,* 49 F. T. C. 791, 881 (1953). Any lingering doubts as to the applicability of this theory were put to rest by the decision in *Balian Ice Cream Co. v. Arden Farms Co.,* 231 F. 2d 356 (9th Cir. 1955), *cert. denied,* 350 U. S. 991, 100 L. Ed. 856 (1956). Finally, regardless of the necessity of a uniform mill net return, unless Atlas block were being sold to petitioner's customers or prospective customers at a lower price than petitioner was selling or offering to sell its block, then no error could have been committed in not charging that a uniform mill net return is mandatory. Thus in the absence of any evidence in the

record, no determination of error by the trial court could be made even if a uniform mill net return is required by law.

D. *Knowledge of Competitor's Price*

This Court in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 759, 89 L. Ed. 1338, 1347 (1945) made it clear that actual knowledge of a competitor's price is not required, but simply due diligence to make the most intelligent estimate of what the competitor's prices are is possible under the circumstances. In the absence of the facts in this case this Court cannot know what the evidence was on which the instruction of the court was given and on which the requested instruction of petitioner was denied, and for that reason this point is without merit.

E. *Lawfulness of the Price Met*

It is clear that there was no evidence of unlawful sales by any competitors of respondent (R. 84). In the most recent case decided in connection with instructions relating to meeting competing prices, the Court of Appeals for the Fifth Circuit ruled that where there is no evidence of unlawful prices a lower court was correct in giving an instruction without the word "lawful" and was in error in granting a new trial and giving an instruction using the word "lawful". *Standard Oil Co. v. Brown*, 238 F. 2d 54 (5th Cir. 1956).

F. *Geographic Price Discrimination*

The quick answer to this argument is that there is no showing that the evidence raised any issue or question of geographic price discrimination as discussed by petitioner under this topic. It is clear that any instructions given or refused on this topic must have had a close relation to the

evidence and absent this evidence no discussion of this point can be made. Moreover, it should be noted that Section 3 of the Robinson-Patman Act, 15 U. S. C. A. Sec. 13 a was voluntarily withdrawn from the case by petitioner at a pre-trial conference.

G. Competing Purchasers Requirement

The legislative history of the Robinson-Patman Act indicates clearly that there can be no discrimination under 15 U. S. C. A. Sec. 13(a) unless sales to competing purchasers are involved. *Congressional Record, 1936,* page 8229; *House Report 2287,* 74th Cong., Second Session. The cases have consistently ruled that competing purchasers are necessary before there can be price discrimination. See, e. g., *Balian Ice Cream Co. v. Arden Farms Co.,* 231 F. 2d 356 (9th Cir. 1955), *cert. denied,* 350 U. S. 991, 100 L. Ed. 856 (1956); *Klein v. The Lionel Corp.,* 138 F. Supp. 560 (D. Del. 1956), *affirmed,* 237 F. 2d 13 (3d Cir. 1956); *Chicago Sugar Co. v. American Sugar Refining Co.,* 176 F. 2d 1, 7 (7th Cir. 1949), *cert. denied,* 338 U. S. 948, 94 L. Ed. 584 (1950).

POINT II. THE COURT OF APPEALS FOR THE TENTH CIRCUIT CORRECTLY REFUSED TO RULE ON CERTAIN PURPORTED OBJECTIONS TO INSTRUCTIONS.

As has been pointed out heretofore in Point I, in the absence of a record on appeal containing the evidence in a trial, an appellate court is never under any obligation to decide the question of whether certain instructions given by a trial court were correct or whether the refusal of the trial court to given certain requested instructions was correct. Actually the Court of Appeals was under no obliga-

tion to discuss any of the objections raised by petitioner to instructions given or refused. The fact that the Court consented to discuss any of these problems was a gratuity granted the petitioner by the Court. Petitioner, by choosing to take its appeal without a record, ran the very risk which actually occurred — that the Court would refuse to go into the merits of its objections.

Moreover, an examination of the instructions of the Court when compared with the objections stated by petitioner shows clearly that such objections failed to bring into focus the precise nature of the alleged error. Clearly, this case is not a situation where a Circuit Court has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision within the meaning of Supreme Court Rule 19 (1) (b).

POINT III. THE OPINION OF THE COURT BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS IN THE SAME MATTERS NOR IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Faced with the vacuum of a record without the evidence, petitioner is simply unable to show that the opinion of the Court of Appeals for the Tenth Circuit in any way conflicts with the decisions of this Court or of any other court. The brief summary we have made under Point I relating to the merits of the contentions of petitioner shows conclusively that far from being in conflict with decisions of this Court and other courts, the opinion of the Court of Appeals was completely consistent with such decisions. Thus petitioner's third point is without merit.

CONCLUSION

For the reasons stated above the petition for certiorari should be denied.

WILLIAM A. SLOAN
Attorney at Law
First National Bank Building
Albuquerque, New Mexico

J. F. HULSE
Attorney at Law
First National Building
El Paso. Texas

Attorneys for Respondent

SCOTT, HULSE, MARSHALL & FEUILLE
El Paso, Texas

JOHN P. EASTHAM and
RODEY, DICKASON, SLOAN, AKIN & ROBB
Albuquerque, New Mexico

Of Counsel